NEXT ANNUAL MEETING WILL BE HELD AT BOSTON THE WEEK OF AUGUST 24

AMERICAN BAR ASSOCIATION JOVRNAL

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Newspaper Item:

Preliminary estimates place the industry's 1936 output at 3,675,000 cars and trucks, which is roughly two and one-half times the 1932 product.

Greater Need Than Ever Before for Adequate Automobile Insurance

FROM all present indications 1936 will see more cars on the road than in any previous year. While this is a sign of returning prosperity it is also a warning to all who own and operate automobiles. For with increased traffic comes greater danger of accident.

Whether or not you are planning to buy a new car this year you should not drive any car without the financial protection afforded by an

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This modern contract may be written to include every insurable motoring hazard.

Ask your local Ætna representative to tell you more about it and to quote rates.

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Arrangements for Next Annual Meeting Now Being Made—Hotel Statler Designated as Headquarters —Plan for Improved Organization Comes Up Monday Afternoon

ARRANGEMENTS for the next annual convention of the Association in Boston during the week of August 24, 1936, are beginning to take form. Indications are for a notable convention amid historic New England surroundings, and for an unprecedented attendance for which the fine hotels of Boston offer attractive accommodations.

Because of its size and convenience, the Hotel Statler has been designated as the Headquarters for the convention, but it seems certain that several other excellent hotels nearby will have to be utilized, in order to accommodate the prospective attendance. According to the announcement made elsewhere in this issue, reservations for hotel accommodations in Boston may now be made, and will be filled in the order of their receipt.

The opening session of the Association convention will be called to order at 10 o'clock on Monday morning, August 24th. After the addresses of welcome and the response in behalf of the Association, the annual address will be delivered by the President of the Association and the reports of officers, Sections and Committees will be filed. At this session, an opportunity will be given for the introduction of resolutions from the floor, for reference, without debate at that time, to the new Committee on Resolutions, headed by Judge L. B. Day of the Nebraska Supreme Court, president of the Nebraska Bar Association, for hearing and later report.

On Monday afternoon, the order of business for the convention will be the report of the Association's Special Committee on Coordination, with its recommendation of a plan for an improved organization of the American Bar Association. It is expected that the proposed amendments to the Constitution and By-Laws of the Association will be discussed and voted on at this afternoon session.

On Monday evening will take place the annual reception tendered by the President and officers of the Association, to the members of the Association and their guests. This reception will take place at a seasonable hour, instead of following other evening events. One of the early events of the week will also be a reception to new members of the Association and to members attending a convention of the Association for the first time. The enrollment of desirable new members may be facilitated by this and other plans for welcoming those for whom this is the first convention attended. The Junior Bar Conference is arranging attractive features for the participation and entertainment of lawyers under thirty-six years of age, and there will be a large attendance of the younger lawyers.

On Tuesday and probably also on Wednesday forenoon, Section meetings and Committee sessions will be held, with Section dinners on Tuesday evening. For Tuesday noon, an Association luncheon is scheduled, with an outstanding jurist as speaker.

Business sessions of the convention will be held on Wednesday afternoon, Thursday, and Friday, with probably an evening session on Wednesday. The "open forum" session, at which the Resolutions Committee will present its report on the various resolutions offered, is likely to constitute one of the most interesting sessions of the convention. The annual dinner will take place on Thursday evening. Attractive entertainment features will be arranged for Friday afternoon and Saturday.

The business sessions will be cleared, as far as possible, of routine, so as to facilitate the dispatch of business and enable the deliberative discussion of important matters before the convention. For the program, some of the outstanding jurists of the English-speaking world will be present during the convention; and several of them will be heard in notable addresses. Exercises of the Tercentenary of Harvard University will be in progress during the period of the convention, culminating in the alumni reunions and the concluding exercises in September.

This will be a New England convention of the Association, and the members of the Association and their families will have an unusual opportunity to visit each of the New England States, with their many historic spots, fine resorts and hotels, and beautiful mountains and lakes. Many members are

planning to motor to New England next summer with their families and to spend a month or more in that region, along with attending the Boston convention of the Association. Detailed information as to the historic and recreational attractions of each of the New England States will soon be sent to all Association members.

HON. L. B. DAY
Chairman of Resolutions Committee for Boston Meeting

President Ransom's Speaking Engagements

THE President of the American Bar Association will attend the annual meeting of the Michigan State Bar Association at the Hotel Statler, Detroit, on Friday, January 10th, and will speak at the annual dinner of the Michigan Association that evening. The inauguration of the integrated State Bar in Michigan will take place at this meeting.

On the evening of January 13th, the President of the American Bar Association will address a dinner of the younger lawyers of Chicago and Northern Illinois, in Chicago, under the auspices of the Chicago Bar Association.

On January 17th and 18th, President Ransom will attend the annual mid-winter meeting of the Ohio Bar Association, at Toledo. On the afternoon of January 17th, he will address a meeting of the Junior Bar of Ohio, on "The Young Lawyer." In the evening, he will speak at the informal dinner of the Ohio Bar Association, on the subject "What the American Bar Association Can Do for the Average Lawyer."

On the evening of Saturday, February 8th, Judge Ransom will be the principal speaker at the annual dinner of the Boston University Law School Alumni Association, at the new Parker House, in Boston; and on February 22nd, he will deliver the Washington's Birthday address at the annual dinner of the Kansas City Law School, in Kansas City, Missouri.

Kansas City Bar Backs Up State Campaign

THE Unlawful Practice Committee of the Kansas City Bar Association has undertaken a vigorous campaign against those practicing law illegally, thus backing up and complementing the efforts of Mr. Boyle G. Clark's Advisory Committee of the Bar Committees, which in Missouri are engaged, under the supervision of the Supreme Court, in enforcing professional ethics and in the suppression of unauthorized practice of law.

The Kansas City Committee has through its chairman, Harold E. Neibling, addressed a letter to all the members of the local association asking their cooperation in the committee's task. After first asking that the members read the statutes and decisions applicable to the practice of law the committee requests:

"(a) If you see fit, please suggest to your own clients who, innocently or wilfully may be violating this law, the impropriety of their acts, so that they may employ duly licensed lawyers to attend their law business. Many laymen have been so long unlawfully engaged in the practice of law as to feel they have some sort of prescriptive right therein. Nearly all of those engaged to any large extent in this unlawful practice have use of, or contact somewhere with, members of this Bar, and the committee believe a large measure of correction can effectively and quietly be made without necessity of outside attention. Members of the Bar understand that they themselves should not countenance such unlawful practices, nor lend their office to their continuance.

"(b) Please let the committee have a report, in writing, addressed to the office of the chairman, with a complete statement of facts known to you to constitute any breach of the law in question. If anonymity is desired, please so state and your wishes will be respected, but due to pressure of time the committee probably cannot consider strictly anonymous information."

The letter then attempts to outline some of the more common forms of illegal practice, at the same time warning that the list is by no means all-inclusive:

"(1) The procuring, preparation, drafting or obtaining signatures to various documents having to do with secular rights of *others*, such as 'escrows,' wills, deeds, contracts, releases, etc., by banks; trust companies; title companies; real estate, loan and accounting agencies, whether corporate or not. Corporations may not lawfully render this service, whether apparently 'gratis' or not, even through the agency of licensed lawyers. Many lawyers are of the opinion that documents so drawn may be, at least, voidable.

"(2) In negligence and compensation cases: The activities of any 'snitch' or 'runner,' either in procuring the case for himself or another; or in statements or representations concerning claimant's rights made privately to the claimant, or before any board, or commission, or to any insurance carrier, or to the one alleged to have been guilty of negligence. The appearance before any commission or board, by lay 'adjusters' on behalf of any insurance carrier; the drafting or procuring of any 'release' or similar document, or repesentations made in 'settlements,' having to do with the secular rights of another, which includes much of the work heretofore done by laymen 'claim agents,' both individual and corporate.

"(3) Similar activities as outlined in paragraph 2 on account of fires, or losses on account of other casualties by 'adjustment bureaus' and 'adjusters,' corporate or individual. It is recognized that mere ascertainment of the extent of these losses need not involve the practice of law.

"(4) In causes pending or being instituted in any court, the over-zealous attentions and hazy 'legal assistance' of laymen clerks, and various attaches and hangers-on about courts, rendered parties or interested persons.

"(5) The activities of lay collection agencies, individual or corporate; many of whom *sell* 'law services' (!), with dire and multitudinous threats of court actions, garnishments, and other drastic actions of the law to be 'enforced' by these laymen."

In this connection a recent Boston news item is of interest. A vigorous campaign under the direction of Attorney-General Paul Dever is now under way in Massachusetts against all forms of illegal practice. The news item in question refers to a warning that will be given to every notary public and justice of peace when application for renewal of commission is made.

"Any person holding a commission as justice of the peace or notary public," the warning reads, "who uses the privilege conferred upon him by his commission to perform acts other than those ministerial acts which it was intended he should perform may be called upon to surrender his commission." The warnings will be sent out by William L. Reed, secretary of the executive council.

Admission Requirement Raised at Georgetown

GEORGETOWN Law School will require a college degree for admission, beginning September, 1936. This decision was reached at a meeting of the Law Faculty held on November 25, 1935, and public announcement was made on November 27, 1935. This change was made on motion of Reverend Francis E. Lucey, S. J., Regent of the Law School. A "combined course" will not be offered, that, is, three years of college work will not be accepted for admission to the Law School and a college degree conferred after one year of law school work, even in the case of students from the college department of Georgetown University. In other words, the requirement of a Bachelor of Arts degree or equivalent degree, will be unqualified.

Solicitor-General Reed to Respond to Welcome at Boston

THE President of the American Bar Association has announced that, at the opening of the New England meeting of the Association, in Boston, on August 24, 1936, the response to the addresses of welcome will appropriately be made, in behalf of the Association and its membership, by Mr. Stanley P. Reed of Kentucky, Solicitor-General of the United States.

Solicitor-General Reed is also serving as a member of the Association's Standing Committee on Jurisprudence and Law Reform, and as a member of the Resolutions Committee for the Boston meeting.

Other details about the coming meeting are on page 1.

Regional Conference of Lawyers of Southeastern States, Held at Atlanta, Hears First Formal Announcement of Plan for More Representative Organization

THE first formal announcement of the details of the new plan for a more representative national organization of the bar was made by President Ransom at the regional conference of the lawyers of the southeastern states called by the American Bar Association to meet in Atlanta, Georgia, on November 22nd and 23rd. In commenting on the various features of the proposed draft of the Constitution and By-Laws, which was printed in the December issue of the JOURNAL, President Ransom stated that it was appropriate that the forum for this announcement should be the first regional meeting held in that part of the United States since the proposal was one which was designed to make the Association representative of the lawyers of the entire country.

The conference was one of the most successful regional gatherings which has been held. It was organized under the direction of E. Smythe Gambrell, Chairman of the Conference of Bar Association Delegates, with the assistance and cooperation of Judge A. B. Lovett, President of the Georgia Bar Association, and the presidents of the Atlanta organizations. The registration of 325 included many Georgia lawyers outside of Atlanta, and a considerable number of out-of-state visitors, representing a total of fourteen states.

The state bar presidents of Alabama, Florida, North Carolina, South Carolina and Tennessee rendered valuable assistance in securing a representative attendance at the conference. In addition to President Lovett of Georgia,

E. SMYTHE GAMBRELL
Chairman, Conference of Bar Association Delegates

President H. Files Crenshaw of Alabama, President William H. Rogers of Florida, President Julius C. Smith of North Carolina State Bar, and a number of former presidents of State associations were in attendance.

The program of the meeting was very stimulating and it was made more enjoyable by the proverbial southern hospitality proffered by the Georgia hosts. Committees on Headquarters, Transportation, Entertainment, Attendance and other features of the meeting were active in seeing that all arrangements were carried out and that guests were made to feel at home, with the result that the program, both official and unofficial, went off with unusual smoothness and with great enjoyment on the part of the visitors.

The meeting opened with a luncheon on Friday, November 22nd, at which the address of welcome was given by Mr. Frank Carter, President of the Atlanta Bar Association. The response was made by Mr. Julius C. Smith, President of the North Carolina State Bar, and this was followed by the introduction of officials representing the American Bar Association and State and local associations.

The afternoon session was devoted to the subject of unauthorized practice of law and was presided over by Mr. Henry Upson Sims of Birmingham, Alabama, former President of the American Bar Association. Mr. Stanley B. Houck of Minneapolis, chairman of the American Bar Association's Committee on Unauthorized Practice of the Law, then spoke on the subject "Recent Procedural Developments, and Participation by Lawyers in Unauthorized Practice." He was followed by Mr. Boyle G. Clark of Columbia, Missouri, General Chairman of the Bar Committees of Missouri. Mr. Clark's subject was "Missouri's Accomplishments and Program for Eliminating the Unlawful Practice of the Law." His address is printed elsewhere in this issue of the JOURNAL. "Lay Encroachment on the Lawyers' Domain in the Southeast" was discussed by Mr. Henry B. Brennan of Savannah, Ga., who gave an interesting account of what had been done in neighboring states to cope with this problem.

There was a large attendance at the banquet in the evening, which was presided over by President Lovett of the Georgia Bar Association, Mr. Alva M. Lumpkin of Columbia, South Carolina, Former President of the South Carolina Bar Association, responded to the toast "The Future of the American Lawyer." He was followed by Mr. Harvey T. Harrison of Little Rock, Arkansas, who spoke in a very amusing vein on the subject of "Mules". President Ransom talked concerning "The Work and Program of the American Bar Association" and addressed himself particularly to the thesis that the American Bar Association must not engage itself in political controversies or seek to promote the views of any one class or group of lawyers. A quotation from this speech is found in the December number of the JOURNAL under the heading "A Familiar Question Answered."

On Saturday morning the subject of "Better Organization of the Bar" was discussed. Mr. E. Smythe Gambrell

presided at this meeting and first introduced Mr. Scott M. Loftin of Jacksonville, Florida, past President of the American Bar Association. Mr. Loftin's topic, "The Movement Toward Coordination in the American Bar Association," led logically up to the address of President Ransom who discussed "A Plan for the Better Organization of the American Bar Association." Judge Lovett spoke of the viewpoint of State and local associations toward the national association. Mr. Will Shafroth, Director of the National Bar Program, briefly discussed some of the features of the new plan, and Mr. B. Allston Moore of Charleston, South Carolina, State Chairman of the Junior Bar Section for that state, gave the young lawyers' viewpoint.

The session closed with the speech of Mr. George B. Rose of Little Rock, Arkansas, Vice-President of the American Bar Association for the Eighth Circuit, who gave some interesting lights on the early history of the Association.

The concluding feature of the meeting was a Junior Bar Section luncheon which was well attended. Arrangements for this were in charge of Mr. Harold B Wahl, member of the Council of the Junior Bar Section from Florida, and he introduced some of the Junior Bar officials from neighboring States. Indicative of the widening scope of the American Bar Association's influence and activity is the fact that many law teachers and law students attended the conference. Lamar School of Law at Emory University had the distinction of having all of its faculty and students in attendance.

In addition to the speakers, the following lawyers from outside of Georgia were present:

Alabama: Douglas Arant, Reid Barnes, Peyton D. Bibb, R. F. Lang, A. Leo Oberdorfer, W. M. Rogers and Ormond Somerville of Birmingham; William P. Cobb, H. F. Crenshaw of Montgomery. *Florida*: Martin H. Long, William H. Rogers, Joseph H. Ross, Harold B. Wahl, Olin Watts of Jacksonville; H. E. Carter, Fred H. Davis of Tallahassee; R. F. Maguire, John H. Wahl of Orlando, A. Melrose Lamar of West Palm Beach. *Illinois*: R. Allan Stephens of Springfield. *Kentucky*: R. W. Keenon of Lexington. *New York*: Emil Kreis of Brooklyn. *North Carolina*: Alexander B. Andrews, Henry M. London of Raleigh; Mark W. Brown, J. Y. Jordan of Asheville; H. Claude Horack of Durham; C. W. Tillett, Jr. of Charlotte. *South Carolina*: George L. Buist, N. Rosen, Walter H. Solomon, of Charleston; R. Beverley Herbert, William S. Nelson, D. W. Robinson, Jr. of Columbia; Ben T. Leppard of Greenville; H. K. Osborn of Spartanburg. *Tennessee*: Aubrey F. Folts, C. G. Milligan, J. H. Reddy, P. A. Thatch, Joe V. Williams, Jr. of Chattanooga; H. G. Fowler, John M. Kelly, of Knoxville; D. Sullins Stuart of Cleveland.

Michigan Supreme Court Adopts Rules Concerning the State Bar

THE Supreme Court of Michigan, on Nov. 12, 1935, adopted rules concerning the State Bar. As is the case in other integrated bars all those actively practicing law are automatically members. Each member is required to file with the Secretary of the State Bar a statement setting forth his business and residence addresses, and the judicial circuit within which his principal office is located. Any subsequent changes in address are to be sent to the secretary. A provision is made for both active and inactive members, the latter not being allowed to practice law. The annual dues for active members is set at five dollars.

The governing body is designated a Board of Commissioners, consisting of twenty-one members, one from each of the seventeen congressional districts and four members from the state at large. The congressional district commissioners are to hold office for three years; the commissioners-at-large for four years. After the organization has got under way the district commissioners will be nominated by petition and elected in their respective districts by mail vote of all the members of the bar in that district. The commissioners-at-large will be appointed by the Supreme Court.

The Board is given general charge of the administration of the affairs of the organization; is expressly authorized to appoint certain committees and prescribe their functions. The publication of at least a quarterly journal is provided for. The Board will cooperate with the State Board of Law Examiners in connection with character examination of applicants "and in such other respects as may be deemed desirable." The officers of the State Bar are to be elected by the Board and the president and vice-president must be commissioners.

As rules of conduct the Canons of Professional Ethics of the American Bar Association are adopted. Five active members in each judicial circuit are to be named by the Board to handle complaints and these committees are given the power, without the necessity of formal complaint, of investigating informally any matter of professional misconduct, and, if there is reasonable cause to believe that such misconduct exists, a formal complaint may be filed and a formal hearing held after due notice to the one against whom the charge is brought. The committee may issue subpoenas and cause testimony to be taken under oath. The committee may after this hearing dismiss the proceeding or administer a reprimand. If however it decides that disbarment, suspension or other disciplinary action is merited it shall file a verified report of the proceedings, including its findings of fact and recommendations, with the Clerk of the Circuit Court of that judicial circuit, after which the court, as a matter of course, shall issue an order to the one complained against to show cause why the committee's recommenda-

From Our Gallery of Association Chairmen: Left, COL. O. R. MCGUIRE, Chairman of Committee on Administrative Law; right, CHARLES E. MATSON, Chairman of Committee on American Citizenship

tions should not be confirmed. Three circuit judges are to be designated to conduct the proceedings on the order to show cause. Any final order entered after these proceedings is reviewable by the Supreme Court at its discretion. It is expressly stated this procedure is not in derogation of the power of the Attorney-General and the courts over disciplinary proceedings.

These rules took effect on December 2, 1935.

Interest Gaining In North Carolina Junior Bar

INTEREST in the Junior Bar in North Carolina is increasing among the younger members of the profession, organizations having been recently formed in several of the larger cities. This is largely due to the program put on at one session of the annual meeting of the North Carolina Bar Association August 20, by E. L. Cannon of Durham, Chairman for North Carolina of the Junior Bar. Among those taking part in the program were Messrs. Spruill Thornton of Winston-Salem, Muriel James of Asheville, W. B. McGuire, Jr., of Charlotte, E. Earle Rives of Greensboro, W. J. Hook of Smithfield and Alston Stubbs of Durham. As a result of this discussion the Association created a permanent Committee on the Junior Bar of which W. B. McGuire, Jr., of Charlotte, is Chairman. The work of this Committee will be watched with sympathetic interest by the older members of the profession.

Drafting Committee of National Bankruptcy Conference Meets

A THREE-DAY session of the Drafting Committee of the National Bankruptcy Conference was held in Detroit, December 13, 14 and 15, for the purpose of further perfecting the arrangement and phraseology of the Conference Draft of proposed amendments to the Bankruptcy Act.

Present at the meeting were: Watson B. Adair, Pittsburgh; Charles True Adams, Chicago; Carl D. Friebolin, Cleveland; John Gardes, New York; Reuben G. Hunt, Los Angeles; W. Randolph Montgomery, New York; Peter B. Olney, Jr., New York; Jacob I. Weinstein, Philadelphia; Paul H. King, Chairman, Detroit; Brace Bennitt, Secretary, New York.

Prof. John Gerdes, of New York University, representing the Trade and Commerce Bar, made a very comprehensive presentation of "Corporate Reorganizations," referring to the discussions of the Debtor Relief Laws Conference, in which he was a moving spirit, conducted at the Waldorf-Astoria in New York on December 7th under the auspices of the University. Mr. Gerdes went over very carefully the experience of the past year under the section, and pointed out some of the difficulties now being encountered in its administration.

From Our Gallery of Association Chairmen: Left, GEORGE H. TERRIBERRY, Chairman of Committee on Admiralty and Maritime Law; right, ARTHUR A. BALLANTINE, Chairman of Committee on Federal Taxation

In connection with the consideration of individual compositions and extensions, Referee Charles True Adams, of Chicago, brought to the attention of the Committee the very extensive use made of Section 74 in that city as a means of solution in thousands of cases of real estate problems. In these, neither the general provisions of the Act nor corporate reorganization proceedings are effective and the section has proved the only practicable means of meeting the situation. Referee Adams suggested at least five important amendments to the existing provisions.

It was the opinion of the Committee that under the circumstances the Conference should assume the responsibility of making more comprehensive recommendations concerning the improvement of the Relief Sections of the Act and the appointment by the Chairman of a Special Committee to accomplish the result was recommended. As soon as the personnel of this important group is completed, its membership will be announced.

The Drafting Committee was in actual session for more than twenty-four hours and fully completed its consideration of the following subjects: "Definitions and Offenses," "Jurisdiction and Procedure," and "Preferences, Liens and Title of the Trustee." It also largely completed the consideration of "Administration" and "Compositions and Discharge." The subjects of "Creditors" and "Bankrupts" were not reached, but these are not regarded as essentially difficult nor as requiring much further consideration. A considerable amount of work remains to be done, as indicated, in the field of "Reorganizations," but this will be speedily taken up and concluded. The Committee adjourned until its January session in Washington.

The National Bankruptcy Conference consists of members of various representative organizations, including the American Bar Association, the National Association of Credit Men, the Commercial Law League of America, the National Association of Referees in Bankruptcy, the American Bankers Association, the Trade and Commerce Bar of New York City, and numerous other organizations and institutions. Its work has extended over a period of more than three years, meetings having been held in Boston, St. Louis, Washington, New York, Cambridge (Mass.), Chicago and Detroit. Its proposals have now gone through four published drafts, the last one being a Committee Print of the Judiciary Committee of the House of Representatives, to which the tentative Draft was presented for consideration by a special committee of the Conference on April 1 and 2, 1935. The Drafting Committee is now engaged in perfecting this Draft and the Conference will undoubtedly recommend, in the light of further experience, additional substantive proposals, particularly with reference to so-called relief provisions.

The Conference is attempting to do its work in a very thorough, painstaking and workmanlike manner, and it is believed that it will constitute a sub-

stantial contribution to the improvement of our bankruptcy law and procedure.

Summarized, its proposals seek to accomplish the following general purposes:

1. *To provide an improved composition procedure, including features of the new so-called "relief provisions"* for individual and agricultural compositions and extensions, and a carefully prepared alternative plan for corporate reorganizations, thus retaining the desirable permanent provisions of the new legislation and making possible the elimination of cumbersome, overlapping, and inconsistent provisions;

2. *To increase efficiency in administration* in many particulars, including the extension of the jurisdiction, term, qualifications, and duties of referees; the appointment of creditors' committees to cooperate with the court; the summary enforcement of liability on bonds to the court; the shortening of administrative periods of time; the regulation of ancillary receiverships; and the coordination of receivership proceedings in other courts with bankruptcy proceedings pending adjudication;

3. *To curb the abuses of equity receiverships* by extending the fifth act of bankruptcy to include the appointment of a receiver for a debtor "while unable to pay his debts as they mature;"

4. *To make the discharge provisions more effective,* from the standpoint of bankrupt, creditor, and the general public, by providing that adjudications shall automatically operate as applications for discharge; by requiring an *examination in every case;* and, on request of the court, securing the intervention of the United States attorney in behalf of the *public interest;*

5. *To tighten up the provisions for the enforcement of the criminal provisions of the act;*

6. *To perfect the sections relative to preferences, liens, set-offs and the title of the trustee,* with specific reference to the defining of a preference and the recovery thereof; stock-brokerage cases; inchoate liens in favor of laborers, contractors, mechanics, landlords and others; set-offs and counterclaims; fraudulent conveyances; good faith transfers; and defenses by the trustee;

7. *To provide a more workable partnership section,* on account of the breakdown of the present provisions;

8. *To make clearer the provisions relative to the jurisdiction of bankruptcy courts,* and to extend them to cover additional matters, including suits by receivers, the determination of dower rights, the removal of bankruptcy trustees, and limitation of ancillary proceedings, and the surrender of, or accounting for, assets by assignees or receivers or trustees appointed in other proceedings in certain cases;

9. *To improve the procedural sections* of the act in the safeguarding of real estate titles, in the examination of hostile witnesses, in proceedings for discovery; and in the practice on appeals;

10. *To minimize evasions by bankrupts* by providing for the filing of schedules with the petitions in voluntary cases, for examinations at discharge hearings, and the filing of "statements of affairs"; and to suspend statutes of limitations during the pendency of the bankruptcy;

11. *To straighten out the statement of the acts of bankruptcy* to avoid the present overlapping of the third and fourth acts and to enlarge the fifth act the better to cover equity receiverships; and

12. *To clarify certain of the definitions, and to add desirable new definitions.* PAUL H. KING, Chairman.

Chicago Lawyer's Bequest for Comparative Law Chair

AN endowed chair of comparative law will be set up at the Law School of the University of Chicago with a fund of $85,000 received from the trustees of the estate of Max Pam, a Chicago lawyer who died in 1925. Allocation of the above sum completes the distribution of the $350,000 which Mr. Pam's will provided should be set aside for such educational and philanthropic purposes as his trustees might designate.

Professor Max Rheinstein, formerly on the faculty of the University of Berlin, and a member of the Chicago faculty since 1934, has been named as the first incumbent of the chair, which will be designated the "Max Pam Professorship of Comparative Law." Professor Rheinstein has served for a number of years on The Comparative Law Research Institutes of Munich and Berlin, and has been co-editor of the yearbook of the Italian Institute of Comparative Law.

"Ticket Racket" Condemned by Chicago Bar

THE practice on the part of certain public officials of constantly asking lawyers to contribute or purchase tickets for alleged charities and benefits, with the implication being made in many cases that this was a necessary prerequisite to transacting business with the particular official, was condemned strongly in a resolution adopted recently by the Board of Managers of the Chicago Bar Association. The resolution called attention to the fact that judges as well as other officials were participating in this solicitation either directly or by permitting their names to be used for others. The funds so collected were not supervised by any regular charity agency and the collectors were consequently not accountable to anyone for the funds collected.

The resolution condemned such conduct as not in keeping with the dignity of public office and as tending to destroy the confidence of citizens in the integrity of public servants. The resolution concludes that the members of the Chicago Bar Association should refuse to accede to any such demands in the

From Our Gallery of Association Chairmen: Left, GEORGE R. FARNUM, Chairman of Committee on Canons of Ethics; right, STANLEY B. HOUCK, Chairman of Committee on Unauthorized Practice of the Law

future and report all solicitations to the Association's Committee on Public Service.

Missouri Shows How It Can Be Done

THE highly unusual occurrence of five lawyers offering to surrender their licenses to practice was witnessed in the Supreme Court of Missouri on December 9. Four of these attorneys had been considered leading citizens of Warrensburg, Missouri. The fifth was a member of the Columbia, Missouri, bar. Boyle G. Clark, General Chairman of the Bar Committees in Missouri, which have the power under the court's direction to investigate matters involving professional ethics and unauthorized practice, submitted the tenders of surrender of license with the recommendation that they be accepted and the names of the attorneys stricken from the rolls. The Supreme Court accepted the offers.

This move came as a dramatic conclusion to the first year of Mr. Clark's committee's activity. During the year there have been one disbarment, one suspension, five surrenders of license, one acquittal and fifteen cases against lawyers are in proccss of trial or are awaiting trial.

From Our Galley of Association Chairmen: JOHN W. GUIDER, Chairman of Committee on Communications

Washington Letter

Income Tax Returns in Duplicate

IN order to permit inspection of Federal income tax returns by State and local tax officials (see Journal of June, 1935, page 390), a regulation has just been issued for the filing with future income tax returns of a copy thereof on a green form which the Treasury will provide.

But let not the taxpayer think his Federal returns are through with inspections when the other taxing authorities have finished examining them and have been furnished such information as they have requested of their State governors. They still may be subject to a number of other examinations such as the following already provided for:

Special Senate Committee investigating the munitions industry, authorized to inspect income and profits tax returns and capital stock tax returns. Executive Order of May 14, 1935.

Senate Committee on Agriculture and Forestry authorized to inspect income, excess-profits, and capital stock tax returns "to the extent necessary in the investigation of the causes of the rapid decline in the price of cotton on the cotton exchanges on or about March 11, 1935. Executive Order of July 9, 1935.

Special Senate Committee to investigate lobbying activities authorized to inspect income, excess-profits, and capital stock tax returns. Executive Order of July 25, 1935.

Senate Committee on Interstate Commerce authorized to inspect income, profits, and capital stock tax returns. Executive Order of August 23, 1935.

In the Supreme Court

The Supreme Court's next meeting has been announced for January 6, 1936, the preceding recess from December 23rd being only two weeks although a three weeks recess previously had been scheduled, that is, until January 13th. No doubt it would be expecting too much to anticipate that such of the recently presented momentous cases as may require extensive opinions will be decided by January 6th.

Constitutionality of the processing tax provided for by the Agricultural Adjustment Act was attacked by Hon. George Wharton Pepper, of Philadelphia, and defended by the Solicitor General, Stanley Reed, in the Hoosac Mills case. A short summary of the arguments contained in the briefs in this important case is presented elsewhere in this issue.

The case involving the Bankhead cotton control Act was argued following that of the Hoosac Mills. This was the case of Moor vs. Texas & New Orleans Railroad Company, where Mr. Lee Moor, a Texas planter, sought to force the carrier, contrary to the terms of the law, to transport his cotton without having attached thereto the tags showing his compliance with the Act. The distinction between this law and the Agricultural Adjustment Act is that the Bankhead Act provides that the Secretary of Agriculture fix a national allotment for each crop year, and producers are given individual quotas from this allotment; whereas the A. A. A., in its cotton program, for instance, attempts to control production of the crop through the use of voluntary contracts and payments to the signers for reducing acreage, the money being obtained by processing taxes.

The contentions of Moor's attorneys were that this legislation was an invalid delegation of power by Congress to the Secretary; that it has no direct relation to interstate commerce; and that it violates States' rights. The Government's points were that the Act is a valid tax law and that it was necessary for the "general welfare." The Solicitor General raised the question of whether this really was a lawsuit. He spoke of it as a "non-adversary" case, the railway company having presented no witnesses in the lower courts; and contended that there was no basis for the Supreme Court to pass on the constitutional question. The Chief Justice ruled that Government counsel could not argue this point because it was not within his province as a "friend of the Court." During the presentation of this case, Solicitor General Reed became ill and fainted. It was several days before he was able to resume his duties in Court.

The eight cases by rice millers against the processing tax on that article were based on the proposition that Sec. 21 (d) of the Agricultural Adjustment Act as amended August 24, 1935 (7 U. S. C. A. Sec. 623 (d)) to require proof, that the burden of the tax had not been passed on to another, as a condition precedent to recovering the amount of any overpayment, was a virtual withdrawal of the Government's consent to be sued for tax of this kind wrongfully collected and therefore there was no adequate remedy at law once payment was made, hence justifying an injunction to restrain collection of the tax.

The millers' contention continued that, because of the separability clause of the Act, section 21 (d) is constitutional although it places an impossible burden of proof on the processor as a condition to the recovery of the money unconstitutionally demanded of him. Upon the Court's inquiry as to whether

(*Continued on page 71*)

MISSOURI'S ACCOMPLISHMENTS AND PROGRAM FOR ELIMINATING THE UNLAWFUL PRACTICE OF LAW

Plan of Organization of the Missouri Bar—Necessity of Suppressing the Unauthorized Practice—Law Lists—Collection Agencies—Lay Insurance Adjusters—Casualty Insurance Companies—Various Lay Activities in the Unauthorized Practice of Law—Obstacles to Be Overcome by the Committee in Enforcement of Rules etc.*

By Boyle G. Clark
General Chairman of the Bar Committees of Missouri

Mr. Chairman, President Ransom, Ladies and Gentlemen: It is a pleasure and an honor to appear before you to talk to you about the accomplishments and program in the State of Missouri for eliminating the unlawful practice of the law. The invitation of the Committee to me was not personal, but was extended to me in recognition of the fact that I am General Chairman of the Bar Committees of Missouri. Nevertheless, the pleasure is mine of being here and meeting the lawyers of this section of the United States, the pleasure of appearing on the program with Mr. Houck who has given so much time and thought to the question of the unauthorized practice of the law and with Mr. Brennan who speaks with authority upon the subject.

1. PLAN OF ORGANIZATION OF MISSOURI BAR

Before I speak to you of the accomplishments and program for eliminating the unlawful practice of law in Missouri, I feel I should outline to you the plan of our organization of the Bar for that purpose. The fulfillment of our plan of organization did not come suddenly. For years Missouri sought to follow the example of California, Oklahoma and a number of other states by organizing the Bar by act of our State Legislature. In keeping with the prevalent idea that organization necessarily could be had only by legislative enactment, we for years attempted the accomplishment of our purpose in the same way. Bills were presented from time to time to the General Assembly of Missouri for the integration of the Bar bottomed upon the California and Oklahoma laws. We never succeeded in the various attempts made, to obtain favorable action of our legislature. In 1933 we fell short only by a few votes. Governor Park, formerly one of the State's leading circuit judges, was Governor of Missouri. He supported our bill and the leading lawyers of the Assembly voted for it. The fear was expressed by many however that the profession was attempting to create an oligarchy, and it was impossible to rally to our support a sufficient number of votes to pass the proposed act.

After the adjournment of the legislature in 1933, the Supreme Court of Missouri handed down the opinion in the Richards Case reported in 63 S. W. (2d) 672. The opinion written by Judge Atwood, then a member of our Court, reannounced the age-old principle that the control of the profession was in the Supreme Court. That the judicial branch of government was separate, distinct and independent of the legislative branch of the government. That the Court had control of admissions to the Bar and the discipline of the Bar. That this was an inherent power vested in the court which could not be abridged or destroyed by the legislature. That in the exercise of this power of control the Supreme Court was independent of legislative enactments.

The Missouri Bar Association immediately after the decision in the Richards Case petitioned the Supreme Court of Missouri for the appointment of a commission to investigate the practice of law in Missouri and to recommend a plan of Bar Government. The Supreme Court granted the petition and appointed a commission of lawyers and judges. Ex-Governor Caulfield, a very able Missouri lawyer, was appointed Chairman of the commission. The commission included circuit judges and practicing lawyers from the various parts of the State. At their own expense these commissioners went to work to prepare a report to the Court. Investigations were made by the members of the commission, hearings were had and after several months, a report was submitted. This report proposed the adoption of five rules by the Supreme Court to be known as Rules 35, 36, 37, 38 and 39. The report was adopted by the Court.

Rule 35 in effect adopted the Canons of Ethics of the American Bar Association as rules of conduct for the members of the Missouri Bar.

Rule 36 established the Bar Committees of Missouri. There was created in each of the 38 judicial circuits of Missouri a Bar Committee of four members. There was also created an Advisory Committee of five members selected from the membership of the judicial Bar Committees. There was created the office of General Chairman of Bar Committees to exercise general administrative control of the Committees and ex-officio Chairman of the Advisory Committee. These Committees were vested with the power of commissioners, to make inquiry as to the conduct of lawyers and given the power to institute disciplinary action. Briefly they have the power of process to subpoena witnesses, take testimony and are charged with the duty of filing informations against lawyers guilty of unprofessional practice in the Courts for disciplinary action. The Advisory Committee is given the power, under direction of the General Chairman, to investi-

*Address before the Regional Meeting of lawyers from the Southeastern States, called by the American Bar Association at Atlanta, Ga., Nov. 22, 1935.

gate the conduct of a lawyer in any part of the State where the accused is a member of a local committee or whenever the General Chairman shall order the Advisory Committee to make such investigation. The procedure for the discipline of lawyers thus provided has been found very efficient.

In addition the Committees are representatives of the Bar with full power to do all things that the Bar as a class may do to advance the standards and prestige of the Bar. The Committees are charged with making inquiry from time to time into the unlawful practice of the law and where the facts justify it to instigate and prosecute as representatives of the Bar such actions as may be appropriate to suppress such unlawful practices.

Rule 37 provides the fees for the financing of the work of the Committees. This rule provides for the payment of an annual enrollment fee of $3.00 on or before January 20 of each year by each practicing lawyer. The fees are payable to the clerks of the inferior courts, and by them remitted to the Clerk of the Supreme Court. Disbursement for expenses are on warrants of the General Chairman.

Rule 38 covers admission to the Bar. The Missouri Legislature had years previously fixed standards for admission to the Bar by statute. The Court in line with the reasoning of the Richards case, by Rule 38 created a Board of Bar Examiners and fixed qualifications for the admission to the Bar, thus assuming full responsibility in that regard, independently of the legislature.

Rule 39 created a judicial council. The purpose of the judicial council thus created is "to make a continuous study of the organization and rules of practice and procedure of the judicial systems and its various parts, to survey the condition of business of the civil courts with a view of simplifying and improving the administration of justice, to receive and consider suggestions concerning remedial rules covering legal procedure, to recommend methods of expediting the transaction of judicial business and eliminating unnecessary delays therein, to study and make recommendations for the improvement and advancement of the practice of law and to submit to the Court such changes in the rules and methods of procedure as may be deemed beneficial and to recommend to the General Assembly such legislation as it may deem necessary for making the administration of justice more effective." The Council is composed of eleven members, nine appointed by the Supreme Court and the Chairman of the Judiciary Committee of the Senate and the Chairman of the Judiciary Committee of the House of Representatives.

By the Court rules thus referred to, the Supreme Court of Missouri fixes the Rules of Conduct of the members of the profession and assumes control of administering the same and provides the method for the disciplining of wayward members of the profession, and provides for the suppression of the unauthorized practice of the law. At the same time it accepts the responsibility of leadership through its judicial council for procedural reform. I believe that you will agree with me that no court in this country has at one time taken such a forward step in the advancement of the administration of justice and for the betterment of the condition of the Bar as has the Supreme Court of Missouri. Missouri is naturally a conservative state. As a matter of fact it is notoriously ultra conservative. The Courts and the legal profession in Missouri, I dare say, are more conservative than in any other state in the Union. The plan of bar government adopted by the Supreme Court of Missouri as I have outlined was not impulsively suggested or recklessly adopted. It was worked out by a commission of the Court, composed of men of vision and adopted by a Court sensitive to its responsibilities to the public and to the profession. It has been sufficiently tried to convince us of its effectiveness. I believe it has the unqualified support of the judiciary, the profession, the public and the press in the State of Missouri.

Under the subject assigned to me at this meeting, I am limited in my talk to the one of the several objectives of the Missouri plan, that relates to the suppression of the unauthorized practice of law.

It shall be my purpose to review our activities and to give you some of our conclusions from the investigations we have made.

2. NECESSITY OF SUPPRESSING THE UNAUTHORIZED PRACTICE

When the Bar Committees first came into existence, we conceived it to be the purpose of the Committees under the Rules of Court, first to bring about the observance of the Rules of Conduct by the members of the Bar; second, to suppress the control of and the parceling out of the law business by laymen, and third, to suppress the unauthorized practice of law. The extent to which we succeed in the accomplishments of this three-fold purpose will be the measure of our success and the success of the Bar of Missouri in bringing about a situation where law business will come to a lawyer in his office upon merit alone, the ideal of every lawyer. The accomplishment of these objectives is necessary to bring the Bar into the position of influence and service it must occupy if it continues to exist.

The public is sensitive to the necessity of eliminating from the practice of law those lawyers who by reason of their conduct bring reproach upon the profession. I am inclined to believe that the larger portion of the profession itself believes that is of the first importance. However, our investigation and study of the situation in Missouri has convinced us that the unprofessional practices of lawyers are bound up with the influence of laymen upon the practice of law. To purge the profession, as is so often demanded, renders it necessary to handle these three problems together. They go hand in hand. The unethical practice of law by lawyers in nearly every instance that has come under our observation has its root in the influence of laymen upon the practice of law or in the unauthorized practice of law by laymen. So, in the accomplishment of our objectives we must strike at all three evils. This we are attempting to do.

It is the purpose of the Missouri Bar Committees that as observance of our code of Ethics is accomplished the members of our profession shall not be left to the mercy of the influences and activities of the laymen who invade the field of the profession.

The lay activities of which I speak are the law lists, collection agencies, independent adjusters and casualty insurance companies. To these may be added other lesser elements hard to classify, which include banks, trust companies, notary publics, real estate boards and agents, various so called business organizations and unauthorized probate court practitioners.

3. LAW LISTS

I shall not consume much of your time in discussing law lists and directories. We have held extensive hearings on this subject. We have completed our work in the main. As a result of our investigation,

the Supreme Court of Missouri amended Section 43 of Rule 35 which is the same as Canon 43 of the American Bar Association. The Court by the amendment of the Rule has provided that a lawyer's card in a reputable directory or list may contain certain biographical matter. It has provided the circulation of a law list or directory to which a lawyer may subscribe must be confined to the members of the profession and prohibits the guaranteeing of a lawyer's fidelity by a list publisher. It makes it unprofessional conduct for a lawyer to permit his name to be printed in a law directory or law lists that does not come within the rule. By amendment to Rule 36 the Supreme Court has given to the Advisory Committee the power and charged it with the duty of determining what publications come within the term "reputable law directory" or the term "reputable law list," and has also charged the Committee with the duty of determining what directories and lists render service to the Bar. These amendments to the rules were adopted on the 18th day of October, 1935, as a result of our investigation.

We found the practice prevalent among law list publishers of soliciting business for subscribers to the lists. This is prohibited under our rules. We also concluded that it was detrimental to the profession to permit lawyers to subscribe to so called selected lists other than in the commercial field. It is our opinion that a general directory which contains a roll of all lawyers and which carries cards with references of such qualified lawyers as care to have their cards inserted will serve as the medium of contact between lawyers necessary to select correspondents to handle law business in distant points. We feel that selected lists tend to promote monopoly and give to the list publisher the right, for compensation, to recommend certain lawyers to the exclusion of others. We therefore, refuse to recognize as serviceable the so called selected lists in general or special lines of practice other than in the commercial practice.

By use of the general directory a lawyer who desired to forward a commercial item cannot determine what lawyers are qualified or willing to accept commercial collections. We therefore, recognize the necessity for selected commercial lists. We take the position however, that commercial lists so far as Missouri is concerned must publish the names of all commercial lawyers qualified to handle commercial items. We fixed the schedule of rates that the approved lists thought fair. Most of the commercial lists did not apply for approval and I understand they expect to blank Missouri and that is satisfactory to us. In making our selection of the commercial lists that we approved we gave consideration to the evidence before us of the practice of the lists; their attitude towards us at the hearings and our confidence in their expressed desire to comply with our rules. So far as we are concerned we will stand by our action. We believe that we have performed a real service to the Bar of Missouri and to the State as a whole. We approved one general directory and three selected commercial lists. We have disposed of all of the applications that have been made to us.

The testimony with reference to the subject of law lists and law directories has been voluminous. The same is being abstracted and we expect to give to the Missouri lawyers a complete report of the evidence, our findings and our reasons for the actions that we have taken.

I want to say to you that we have given hearing to everyone, layman or lawyer, who has appeared before us. We have listened to them all. But when we came to decide the question we decided it as the representatives of our Bar, as lawyers. We decided it with the interest of the profession and the public at heart. We decided it without reference to the cry of the credit bureaus, commercial organizations and the lay agencies. We believe our decision will result in a higher standard for the profession in Missouri and will enable the lawyers to a greater degree to serve the public uninfluenced by lay agencies.

4. COLLECTION AGENCIES

Hand in hand with the problem of the law lists is the problem of the collection agencies. For years the agencies have grown in power and influence on the legal profession. The bonded commercial law lists with few exceptions, have encouraged the growth of the collection agencies as the middle man between the lawyer and his client. The commercial list fixes its fees on the amount of business its lawyer subscriber receives and encourages the lay collection agency to use its list in forwarding business to swell its revenue from the lawyer. These lists have discouraged direct contact between lawyer and client. The lists furnish the means for the lay agencies to handle the collection business in violation of the law in Missouri.

Necessarily the Committee's campaign against the unauthorized practice of law included both law lists and lay agencies. There is now pending in the courts of Missouri some dozen cases filed by the Committee and the Attorney General. These cases are pending both in the Supreme Court and in our inferior courts. The adjudication of these cases will result in the final disposition in Missouri of the question of the lay agencies. Without exceptions the Courts in other States have held that these lay agencies are engaged in the unauthorized practice of law. It is our feeling that our Courts will follow the decisions in these other States.

5. LAY INSURANCE ADJUSTERS

a. *Casualty Insurance.*—The Committee, after much investigation and thought, has come definitely to the opinion that the adjustment of casualty insurance claims involves practically every element of the practice of the law and is the practice of law. We have taken considerable testimony and discussed the matter with lawyers and especially lawyers representing the individual lay adjusters. A quo warranto suit was filed in the Supreme Court of Missouri against the Universal Adjustment Company, a corporation, one of the largest lay adjustment agencies in our State. The adjustment company in that case made return in which it admitted that it was engaged in the practice of law and consented to a fine and ouster. A number of lay adjusters have voluntarily discontinued their business. Others who do not discontinue their business by January 1st will be proceeded against by the Committee.

b. *Independent fire insurance adjusters.*—Testimony has been taken in the investigation of the independent fire insurance adjusters. The Committee has not studied the testimony however, and we have arrived at no conclusions whatever. No doubt in the adjustment of fire insurance losses there is much that can be done by a lay investigator. Part of the practice indulged in however invades the field of the practice of law. Counsel representing the independent fire insurance adjusters have expressed a desire on the part of the adjusters to cooperate with the Committee. My own feeling is that we will work out the line of demarcation between proper practices of lay-

men in the adjustment of fire insurance losses and the practice of law. Further hearings will have to be had, and investigations made, but the Committee is receiving such cooperation on the part of the fire insurance adjusters that I believe a peaceful and proper solution will be reached.

6. CASUALTY INSURANCE COMPANIES

Many casualty insurance companies operate through individual lay adjusters. The suppression of the individual lay adjuster will result in the handling of their adjustments through other channels. Most of it has already been taken over by lawyers qualified and capable of adjusting claims. The companies that maintain their own claim departments present another problem. Both the companies and the Committee realize the necessity of correcting many practices on the part of the companies. Seventy-five per cent of the contested personal injury suits in Missouri affect casualty insurance companies. These companies are affected directly by the soliciting of cases by lawyers, by the fixing of witnesses and the tampering with juries. These practices directly affect the public as well as the profession and the casualty companies, and the belief in the prevalence of these practices no doubt has been largely the cause of much criticism leveled at the Bar. Under the Court Rules we have proceeded directly against the chaser. The other abuses I have mentioned, have received no consideration by the Committee whatever. The Committee will deal with specific cases. There has been some effort made by lay organizations to investigate the prevalence of false evidence and jury tampering. Lay organizations can accomplish nothing in this regard. When the matter is gone into, it should be by the Bar Committees.

Suppression of the soliciting of cases by lawyers has created another evil, to-wit, the making of improvident settlements by insurance adjusters with claimants. The charge is also made that lay insurance adjusters working out of the claim offices of some companies settle cases behind the lawyer's back, influence witnesses and generally do many of the things that the shyster lawyer has been accused of doing. As we suppress these evil practices on the part of the lawyer, at the same time we must see to it that such practices are not resorted to by the insurance companies. In this the better companies fully agree. There will be a complete and intensive investigation of the casualty insurance business. It is a matter of importance to the public, to the companies and to the profession. In such an investigation I am assured that the Bar will have the cooperation of the casualty insurance companies.

7. VARIOUS LAY ACTIVITIES IN THE UNAUTHORIZED PRACTICE OF LAW

In addition to the particular classes of unauthorized practice of the law by laymen that I have referred to there are many laymen and lay organizations in other fields that engage our attention. In the rural communities the Probate practice is largely in the hands of laymen. Title companies deserve our consideration. Various bureaus, business organizations, trade associations, as well as real estate agents, notary publics, and in some places banks and trust companies undoubtedly violate the law by engaging in improper practices. Much of this practice is purely local in its nature and does not have the statewide effect of the law lists, lay collection agencies, lay insurance adjusters and casualty insurance companies. Local committees in various parts of the State have suppressed the practices of laymen engaged in business in the particular community of the Committee. However, much work and much time must be given to this problem.

8. ACCOMPLISHMENTS

We are encouraged by our accomplishments in the first nine months of our efforts under the Court Rules. The greatest accomplishment of all has been the growth, it seems to me, in the sentiment of the Bar for the rules and for the enforcement thereof. I have endeavored in every way possible to ascertain the attitude of the average lawyer in Missouri towards the rules and towards the enforcement of the same by the Committee. The meeting of the Missouri State Bar Association at Springfield in September was the greatest State Bar Association meeting held in my memory. I think its success was largely due to the interest of the lawyers in the efforts that are being made under the Missouri Supreme Court rules to correct the evils that exist in our state. In the two days of that meeting I received more encouragement to go ahead with the work than I had received in the previous nine months of my service as General Chairman of the Bar Committees. If there was any substantial opposition to the program of the Bar, as I have endeavored to outline it on several occasions, I did not discover it at that meeting. To accomplish permanent results we must have the support of the Bar.

Attorney General Dever, of Massachusetts, is carrying on a relentless campaign to suppress the unauthorized practice of law in that State by lay collection agencies. I want to quote from a statement by him to the Bar of Massachusetts. He said:

"The problem of unauthorized practice of law has always strongly concerned those who had the welfare of the bar at heart.

"In recent years, however, this problem has become such as to seriously impair the protection which tradition and the law sought to afford the public.

"The amazing growth of collection agencies, automobile associations, banks, trust companies, trade associations, protective associations, title examining companies, and all other forms of law agencies too numerous to mention here, that practice law, constitutes a menace to the public welfare.

"The bar is an indispensable part of our society, as it is now constituted, and it alone can best protect the interests of the public when the latter's legal rights are affected. The situation no longer can be tolerated.

"To the end that this abnormality be completely done away with, I have caused to be instituted a sweeping investigation into all forms of unauthorized practice of law.

"Hearings are being held daily and the evidence is being gathered as expeditiously as possible. We shall bring these matters before the court very shortly.

"The law would seem to be well established. The problem is merely one of gathering and presenting the evidence properly. Obviously, we need the enthusiastic and whole-hearted co-operation of a united bar, if this work is to be carried to a successful conclusion.

"I cannot urge it too strongly upon the members of your association to assist us in the accomplishment of the important task before us."

I believe that in the nine months the committees have functioned we have diagnosed the evils that confront the profession in our State. We, of course, know that improper practice resorted to by lawyers was an evil. We have found, however, that our troubles in the main are caused by the influence of laymen upon the lawyer in the practice of law. It is not worthwhile to meet the demand of the public to purge the

Bar and leave the cause of the necessity to purge the Bar in existence. Lay influences must be destroyed else we cannot have an independent ethical bar. We have not only realized the necessity of this but we have outlined the campaign for the accomplishment of that objective. At least those interested in defeating us in our efforts to suppress the unauthorized practice seem to think that we are striking at the vitals of the evil. "The Solicitor" an agency publication in Chicago in a recent issue said in speaking of the Missouri situation:

"Specifically the actions filed in Missouri will result in the Court's definition of the 'unauthorized practice of law.' If the agencies are found guilty by the court's interpretation, heavy penalties will result. The agency will be prohibited from further operation in Missouri and in that event, the Bars of other states are expected to bring actions based on similar charges.

"Thus, the agency group in the event of a decision adverse to themselves will be forced to appeal the Missouri decision to the United States Supreme Court. It may be of some general interest to learn that the anticipated expenses of the defense will aggregate more than $25,000.00 with an unpredictable result in the balance.

"The precise point at which to deliver the mortal thrust to the agency as an organism has long troubled the bar. The scapegrace agency has been held up to scorn in the public print, but nobody became excited. Restrictive legislative measures of one kind or another have multiplied themselves with startling rapidity. It remained for the Bar Committees of Missouri to both fashion the lethal implement, 'the unauthorized practice of law' and to employ it in an attempt to sever the agency from one of its main sources of revenue—the forwarded account."

In our suppression of the unethical law list we have obtained the interest of the bars of a number of other states including Oklahoma. Campaigns against the unauthorized practice of law are assuming national importance. At the Springfield Missouri Bar Association meeting 14 states were represented. Lawyers from these 14 states came there to discuss the suppression of the unauthorized practice of law. While we realize that our work has just begun in Missouri, we do feel that great progress has been made by the Bar Committees, progress in obtaining the support and backing of the Bar, progress in the discipline of lawyers, progress in creating in the public mind a feeling that the high ideals that we preach must be observed in the practice, progress in creating in our own mind the belief that we can suppress the lay influence and lay practice that strangle our profession, and progress in creating a professional spirit and professional pride for the Bar as an institution of service to the public.

9. OBSTACLES TO BE OVERCOME BY THE COMMITTEE IN THE ENFORCEMENT OF THE RULES

a. *Political influence.*—The promotion of any work in the public interest in America is subject more or less to political influence. These influences are brought to bear on the work of the Committees. It is natural that that should be so. Powerful interests are affected by our efforts. These interests resort to any available means to direct or thwart the work of the Committees. No member of the Advisory Committee, however, has any political aspirations. Our interest is entirely and solely in accomplishing the purposes of the rules. We endeavor to pass upon every matter upon its merits. We must depend upon other agencies of government to make effective the things that we are attempting to accomplish. These influences may retard or distract our efforts at times, but ultimately we will succeed regardless of any political influences.

b. *Indifference on the part of the Bar.*—For many years there has been no well defined plan in our state to correct the evils recognized to exist in the profession of law. Lawyers became indifferent to the practices that our professional standards condemned. There developed a tendency to believe that nothing could be done. Lawyers came to believe that regardless of individual opinion the Bar was incapable of coping either with the practices within the profession or the unauthorized practice by laymen. You cannot expect this feeling to be overcome in a short time. A sentiment that has developed over a period of fifty years cannot be changed in a few months. That feeling of indifference or belief that the proposed objectives of the Committees are impossible of attainment still exists in the minds of many lawyers. A spirit of professional consciousness has not yet come to the Bar as a whole. Until we have created among the lawyers in our state the conviction that the purposes and objectives of the Rules of Court can be realized, we cannot expect the full accomplishment thereof. Efforts are being made to encourage the timid members of our Bar. The will of the 5,000 lawyers of Missouri working and thinking in united effort is irresistible; and once the Bar as a whole has made up its mind that a better day is before us and the full accomplishment of our aims can be had, at that moment the battle is won. All opposition will be swept aside because we are right and if supported by the Bar as a whole, right will prevail.

c. *The charge of selfishness by laymen.*—In our efforts to suppress the unauthorized practice of the law, we are being met with the charge that the Bar is selfish, that it is seeking for selfish motives to drive laymen out of practice to the end that we may profit financially by the business now done by laymen. More than two million dollars worth of law business a year is done by laymen in our state so far as we can determine. It may run far in excess of that amount. If the practice of law in the interest of the public must be subject to strict regulation, then we should not be called upon to compete with laymen who recognize no standards. Even in the public utility field in the interest of the public where the utility is regulated, competition is not permitted. You cannot have regulation and competition. Anybody who stops to think will realize that is true. You cannot regulate the lawyer and require him to live in competition with unregulated lay organizations or laymen engaged in the practice of law. Either regulation must go or the unregulated competition must be suppressed.

In answer to the lay charge that the motives of the Bar are selfish, I say that we are prompted, in part, by the same motives that prompt an owner of property to recover it from one who has wrongfully taken it from him; the same motives which prompt the medical profession to guard jealously the franchise which it has won by superior training and constant rendition of public service.

d. *The influence of lawyers who benefit by the activities of lay practitioners.*—Another influence against the progress of the work of the Bar Committees is the attitude of lawyers who benefit by their connections with lay practitioners. This is especially true in the insurance field and commercial law field. Lawyers who receive business from the commercial agencies and

the independent lay adjusters naturally fear the result of the suppression of the activities of these lay agencies. They feel that it will affect their business. I don't think their fears are grounded but that fear on their part has resulted in opposition from many of them to our efforts to suppress the unauthorized practice of law. Anyone familiar with the hearings on law lists before our Committee must appreciate this fact to the fullest extent. Lawyers who benefit from the law business distributed by lay practitioners opposed the efforts of the Committee to suppress the improper practices of law lists and especially the practice of law lists in bonding attorneys and soliciting business for the list subscribers.

10. OUR FUTURE PLANS TO ACCOMPLISH OUR OBJECTIVES

The accomplishment of our objectives in Missouri to suppress the unauthorized practice of law, depends upon sustained effort on the part of the Bar Committees. These Committees serve without compensation. One thing that justified giving to the Bar Committees appointed by the Court the power and imposing upon the committees the duty of suppressing the unauthorized practice, is the fact that it places the responsibility square on these committeemen. There is no divided responsibility. There is no dependence upon voluntary aid or voluntary effort. Even though the committeemen serve without compensation, they are the sworn officers of the Court charged with the responsibility under the law of performing their duties. They are selected for terms of four years. The public and the Bar has the right to look to the committeemen as responsible agents for the enforcement of the rules.

The Committees have made greater progress in the first nine months of their efforts than anyone ever hoped for. Their accomplishments are examples of what may be done by organized effort. Their future accomplishments depend upon the sustaining of that effort. The sense of obligation to the public, to the Court and to the profession will cause the committees to sustain the effort. The support that we have received from the press, from the Bar, and from the public is an inspiration to us to continue our efforts.

Voluntary bar associations usually exhaust their energy in resolutions and speeches. The Bar Committees of Missouri must show tangible results. They cannot absolve themselves from the performance of their duty by talking and adopting resolutions. They must show their worthiness by action, and this they are doing. We have pledged to our members that we will absolutely eliminate the encroachments upon the profession by laymen and lay organizations. I say to you that we will do it. Twelve months more and the entrenched lay practitioner will be blasted from his stronghold in Missouri. We will always have a few bushwhackers to contend with, but we are on the road to a complete return of the law practice to the lawyer where it belongs, not for the sake of the profession alone, but in the interest of the public, in the interest of good government, and in the interest of the administration of justice.

In our efforts for the suppression of the unauthorized practice of law in Missouri we have the unqualified cooperation and support of our Attorney General, Roy McKittrick. To him must be given credit for a large part of the success attained. No public official in America is doing more for the profession than our able Attorney General other than Attorney General Dever of Massachusetts.

11. THE AMERICAN BAR ASSOCIATION AND THE UNAUTHORIZED PRACTICE

What we are doing and what we have done in Missouri can be accomplished by the Bar in any state in this Union, if a few determined men will set themselves to the task. The courts as I have stated universally hold that the matter of protecting the profession against unlawful encroachment is an inherent power of the judiciary. The bar association of every state in the Union regardless of the organization of the Bar should give impetus to the movement inaugurated by the American Bar Association to suppress the unauthorized practice by law by instituting suits against the principal lay agencies guilty of encroachment. Every bar organization in the United States should seek to suppress the influence of the law lists which divert business to selected lawyers and encourage the operation of lay agencies. The law list as a medium of contact between lay agencies engaged in the practice of law and lawyers should be suppressed. We will never have an independent bar as long as they are permitted to exist. They are the best example of laymen controlling law business and their influence is much more far reaching than the average lawyer thinks. Attack on the agencies and lists has a tremendous moral effect on the Bar and a deterring effect on others engaged in the unauthorized practice. It is my opinion that in Missouri, we have in the last three months succeeded to a great degree in suppressing the unauthorized practice in all fields by our efforts towards suppressing the improper practice of the law lists. By reaching them we reached the lay agencies and brought to the attention of the public and the profession the magnitude and the deteriorating effect on the Bar caused by unauthorized practitioners.

The American Bar Association through its Committee headed by Mr. Houck has done great service. The work of that Committee has been inspirational to us in Missouri, and I believe in other States. That Committee has provided us with the ideas and with the initiative to go forward. If I have one suggestion to make it is that that Committee or some other Committee of the American Bar Association work to coordinate the efforts of the various State Bar organizations by encouraging the filing of suits against interstate violators of the law. There are great organizations doing business, for instance outside of Missouri, that send their representatives into the State. We know who they are. The American Bar Association could render great service in cooperating with the states seeking to suppress such practitioners, by taking specific cases and encouraging the Bars of the domicile of these practitioners to institute suits against them. Once that is undertaken the movement in America to suppress the unauthorized practice by laymen will have received such impetus that nothing in the world will stop it.

12. SHALL WE SAVE THE PROFESSION OF LAW?

The Bar of America has been the target of criticism for a number of years. He is blind who cannot see that it has lost much of its grandeur and its prestige. A profession that has given to the Anglo-Saxon race the Bill of Rights and has given to the world this great government of ours stands to be discredited. From Runnymede to this hour no person or persons have been capable of advancing a system for the ad-

(*Continued on page* 28)

THE NEW FRAZIER-LEMKE ACT—ITS PROVISIONS, ITS CONSTITUTIONALITY

Grounds on Which the United States Supreme Court Held the First Act Unconstitutional in the Radford Case—Extent to Which the New Legislation Meets the Fatal Defects Pointed Out in Former Measure—Treatment of Certain Substantial Property Rights of Mortgagees—Detailed Provisions Discussed, etc.

By F. Carlisle Roberts

Associate Professor of Law, University of South Carolina Law School

HASTILY drafted and hurriedly passed, criticized as an outstanding example of ill conceived legislation,[1] the first Frazier-Lemke Act inspired a storm of controversy as to its validity which waged unabated until the Supreme Court, in *Louisville Joint Stock Land Bank v. Radford*,[2] held the act unconstitutional on May 27, 1935. Immediately thereafter rural constituents renewed their demands that legislation be enacted which would save their farms and homes from mortgage foreclosure during the continuance of the depression. A number of bills were introduced in the first session of the 74th Congress proposing a new subsection (s) to Section 75 of the Bankruptcy Act, designed to meet the objections of the Supreme Court to the original enactment. After extensive hearings, S. 3002, which had been sponsored by Senator Frazier and Representative Lemke, both of North Dakota and authors of the first act, passed both houses and was approved by the President on August 28, 1935.[3] Though more carefully drawn than the first act, the new one continues to raise some problems of construction; and though designed to cure the constitutional defects of the first act, it is not at all clear that the present enactment does so.

With the purpose and history of the first Frazier-Lemke Act the profession generally is acquainted. The depression had made it impossible for farmers to meet payments due under mortgages upon their farms and homes, with wholesale foreclosures resulting. Desperate farmers in the Middle West gathered and forcibly prevented foreclosure sales. Twenty-six states enacted some form of moratory legislation. Congress first stepped into the breach on March 3, 1933, with Section 75, an amendment to the Bankruptcy Act which provided for compositions and extensions for the benefit of farmers similar to those permitted individuals and partnerships under Section 74. This proved inadequate, however, in that approval of a majority in number and amount of claims was required in order to effect a composition or extension, which in practically every case meant a veto power in the mortgagee.[4]

The first subsection (s), popularly known as the Frazier-Lemke Act, was added to Section 75 in June, 1934.[5] It provided that upon failure of the farmer to procure approval of a composition or extension proposal, he might petition to be adjudged a bankrupt. Thereupon all proceedings against him or his property were to be stayed, his property appraised, and he permitted to "buy" all or any part of his property, free from claims of his creditors, by paying the appraised value on the installment plan over a period of six years, with interest on deferred payments at the rate of one per cent. per annum; the farmer retained possession during the six-year period. Should any secured creditor affected thereby object to this partial-payment plan of purchase, a second course was to be pursued. The court was then required to stay all proceedings for a period of five years, allowing the farmer to retain possession of his property upon payment of a reasonable rental. At any time within the five years the farmer might buy his property by paying its appraised value. Under either plan the amount of the indebtedness was scaled down to the value of the property as appraised. The first Frazier-Lemke Act, therefore, in addition to providing for a moratorium upon enforcement of farm mortgages for a period of five years, gave the mortgagor the exclusive right of purchasing the property, at a time and at a price which the mortgagee had no part in fixing.[6]

In the *Radford* case the Supreme Court said that the bankruptcy power was subject to the Fifth Amendment, and held the first Frazier-Lemke Act unconstitutional, on the grounds that it deprived the mortgagee bank, in that case, of the following property rights recognized by the law of Kentucky:

"(1) The right to retain the lien until the indebtedness secured thereby is paid.

"(2) The right to realize upon the security by a judicial public sale.

"(3) The right to determine when such sale shall be held, subject only to the discretion of the court.

"(4) The right to protect its interest in the property by bidding at such sale whenever held, and thus to insure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.

1. See John Hanna, *"Agriculture and the Bankruptcy Act"* (1934) 19 Minn. L. Rev. 1.

2. 295 U. S. 555, 79 L. Ed. 920, 55 Sup. Ct. 854, 97 A. L. R. 1106.

3. Bankruptcy Act, Sec 75(s), 11 U. S. C. A. No. 203(s).

4. See Hanna, "The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act" (1934) 20 A. B. A. J. 687; Hanna, "Agricultural Compositions and Extensions under the Bankruptcy Act" (1934) 20 A. B. A. J. 9.

5. Public—No. 486—73rd Congress, June 28, 1934.

6. See generally, Hanna, *loc. cit., supra*, notes (1) and (4); and the writer's "Property, Mortgaged Land, and the Frazier-Lemke Act", (1935) 13 North Carolina L. Rev. 291.

"(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

Before attempting to appraise the constitutionality of the new act, consideration will be given to its provisions. The reader may now be given the benefit of the writer's opinion, however, that the first, second and fourth of the property rights of the mortgagee mentioned in the *Radford* case are preserved in the new Frazier-Lemke Act, but that the third and fifth apparently are not.

Under the new act, as under the old, the farmer must first have proceeded unsuccessfully under Section 75(a-r) before he may invoke the provisions of subsection (s), the Frazier-Lemke Act. That is, he must have failed to procure assent of a majority in number and amount of the claims against him to a composition or extension proposal, or "feel aggrieved" by such a proposal which has been accepted.[7] The new act also provides that any farmer who has filed a petition in voluntary bankruptcy under the General Bankruptcy Act may take advantage of "this section." Presumably "this section" means Section 75 in its entirety, hence a farmer who is in straight bankruptcy and desires the benefits of the new Frazier-Lemke Act will also have to attempt a composition or extension first. Three District Court decisions had held that under the first act voluntary bankruptcy proceedings could not be converted into composition and extension proceedings.[8]

Having met the condition precedent of attempting a composition or extension settlement, the farmer may then file his petition under subsection (s), asking that he be adjudged a bankrupt and allowed the benefits of that subsection. All the property of the debtor is then to be appraised at its fair and reasonable market value, with the right in either debtor or creditor to file exceptions within four months from the date of approval of the appraisal by the referee. It was not clear under the old act whether the conciliation commissioner, to whom the original petition for composition or extension had been referred, was to continue as referee in the proceedings under subsection (s), or the referee in bankruptcy.[9] The new act explicitly provides for the former. As such referee the conciliation commissioner is to receive such additional compensation as may be allowed by the court, not to exceed thirty-five dollars, to be paid out of the bankrupt's estate.[10]

After the value of the debtor's property has been determined by appraisal, the referee is to set aside to the farmer his "unencumbered exemptions," and order that the possession of all or any part of the remainder of his property is to remain in the debtor, under the supervision and control of the court, "subject to all existing mortgages, liens, pledges, or encumbrances.[11] Thus the new act makes plain a point which was doubtful under the old act; that is, exempt property on which there are encumbrances is to be administered by the court, and not set aside to the debtor, with the resulting possibility that the holder of a mortgage on the exempt property might then be allowed to proceed to foreclose. That possibility was considered something of a "joker" in the first act, materially decreasing the usefulness of the act to the farmer.[12] The provision for retention of liens to secure payment of the full amount of secured claims meets the first objection laid down in the *Radford* case.

After setting aside unencumbered exemptions, the court is to stay all proceedings against the debtor or his property for a period of three years (as contrasted with five years under the old act), the farmer being required to pay a reasonable rental semi-annually for such of his property as he retains possession of. The first election given the farmer under the old act, i. e., to agree to purchase his property on the installment plan over a period of six years, is omitted entirely in the new act. The new act sets up as criteria for determining the amount and kind of rental to be paid "the usual and customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property." The rental is to be paid into court, to be first applied upon taxes and upkeep of the property, the remainder to be paid to secured and unsecured creditors, as their interests may appear, and applied on their claim. Nothing is said about interest, but presumably it will continue to accrue upon secured claims. Under the old act, rental payments were to be made annually, the first payment to be made within six months of the order staying proceedings. The new act requires semi-annual payment of rental, but goes on to provide that the first payment is to be made within one year from the date of the order staying proceedings. Thus, while the new act provides for more frequent payments, it doubles the period for the first payment, during which time the creditor cannot be assured that he will in fact be paid anything. The court found this feature objectionable in the *Radford* case, even where the waiting period was only six months. Doubtless the reason for providing in the new act that the first payment of rental is to be made within one year was to leave the court free to fix the dates for payment at a time following the harvesting of crops, as is customary in agricultural leases.

In addition to the rental, the court may require quarterly, semi-annual or annual payments on principal, "not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation." The court may also, in its discretion, order sold at private or public sale any unexempt personal property which is (a) perishable or (b) not reasonably necessary for the farming operations of the debtor, if it deems such sale necessary to protect the creditors from loss and/or to conserve the security. Neither of these provisions appeared in the first Frazier-Lemke Act.[13] They obviate some-

7. It is still not clear what might cause him to "feel aggrieved" by acceptance of a proposal made by himself, and no cases have been found construing similar language in the first act.

8. In re Henderson, U. S. D. Ct., W. D. Mo., Feb. 26, 1935; In re Byers, U. S. Dist. Ct., N. D. Pa., Feb. 2, 1935; In re Metcalf et al., U. S. Dist. Ct., N. D. Pa., March 23, 1935.

9. See in re Rice, U. S. Dist. Ct., N. D. Mo., Feb. 1, 1935; Sapalc v. White, 9 Fed. Supp. 419; In re Payne, 10 Fed. Supp. 649.

10. The farmer must pay a filing fee of $10 when he files his petition. For his services in connection with composition and extension proceedings, the conciliation commissioner receives a fee of $25, paid out of the Treasury. Section 75(b). Prior to a 1935 amendment to this subsection (Public—No. 384—74th Congress, August 28, 1935), the conciliation commissioner had to pay all expenses out of his $25 fee. It is now contemplated that expenses shall be charged against the bankrupt's estate. (Senate Report No. 985 on S. 3002, May 13, 1935).

11. Under the old act the lien was retained only to the amount of the appraised value of the property.

12. See Hanna, "The Franzier-Lemke Amendments to Section 75 of the Bankruptcy Act" (1934) 20 A. B. A. J. 687.

13. However, No. 75(p) formerly read: "The prohibitions of subdivision (o) (relating to stay of proceedings) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his

what the fixed harshness of the first act upon the rights of creditors and evince a desire on the part of Congress to interfere with those rights only insofar as it may be necessary to do so in giving the farmer a three-year "breathing spell" in which to rehabilitate himself.

At the end of the three years, or at any time prior thereto, the debtor may purchase the property of which he has retained possession, free and clear of claims of his creditors, by paying into court the amount of the appraised value, less any amount which may have been paid on principal. Two provisos come into operation when the debtor offers to buy his property: (1) Any creditor, or the debtor himself, may demand a reappraisal of the property, in which case appraisers are to make a new appraisal, or the court may itself take evidence and fix the then value of the property. The debtor is then to pay the value according to the latest determination, without choice in any party as between that figure and the earlier one. Thus, while creditors are protected to the extent of any increase in the value of the property, they are worse off than under the old act if the property has depreciated in value since the first appraisal. For the debtor now has the right to ask for a new appraisal when he offers to buy, and if the value as then determined is less than under the first appraisal, he nevertheless pays the amount of the new appraisal. (2) The second proviso gives any secured creditor the right, upon written request, to demand that the property upon which he has a lien be sold at public auction, in which case the debtor is to have 90 days to redeem from the sale upon payment of the amount bid, with interest at the rate of 5 per cent per annum. Thus are the first, second and fourth property rights of the mortgagee which the first act invaded, according to the *Radford* case, now secured under the new Frazier-Lemke Act; that is, the lien is retained until the debt is paid, and a public sale is to be held, at which the mortgagee may protect his interests by bidding. The new act, as originally drawn, limited the bid which the mortgagee might make to the amount of the appraised value of the property, but that limitation fortunately was deleted upon objections made in hearings upon the bill.[14]

After full compliance with the provisions of the act, and with all orders issued by the court in the course of the proceedings, the farmer is to be granted a discharge. If, however, he fails to comply, "or is unable to refinance himself within three years," the court may appoint a trustee and order the property sold or otherwise disposed of as provided for in the Bankruptcy Act. It might be argued that the court could immediately proceed to administer the estate in bankruptcy if at any time it appeared that the debtor would not be able to rehabilitate himself within the three year period, and that this might be shown when relief under the Frazier-Lemke Act is first asked for. A fair construction of the act, however, seems to lead to the opposite conclusion. It appears to be contemplated that the three year stay is to be automatic, without reference to the probability, or indeed the possibility, of the farmer's being able to get on his feet financially by the end of the three years.

However, the provisions of Section 75(a-r), under which the farmer must first proceed before he may invoke subsection (s), may in a measure accomplish the same result. Under that section the composition or extension proposal must have been made "in good faith," and a number of courts, including the Circuit Court of Appeals for the Seventh Circuit, have held that such a proposal is not made in good faith if it is not reasonably calculated to effect a debt liquidation.[15] In *Re Borgelt*,[16] the Circuit Court of Appeals for the Seventh Circuit, speaking through Judge Sparks, said: "Subsection (s) presupposes a probability of eventual debt liquidation. It further presupposes a prior good faith effort on the part of the debtor to propose or accept a plan which is reasonably calculated to effect a debt liquidation." He then cites with approval the opinion of the District Judge in that case, who said that "No debtor should be permitted to make and no creditors should be required to exercise his right in accepting or rejecting a proposal except one made honestly and in good faith. The consideration contained in the proposal of composition should be in an amount or value not substantially less than the value of the debtor's property, excluding the value of any exemptions. . . . A proposal conditioned upon the ability of the debtor to borrow the amount proposed would not be sufficient. This does not mean that the proposal must be in cash."[17] If the courts generally follow this rule, a farmer who has no reasonable prospect of rehabilitating himself will not be able to get into subsection (s) because of the dismissal of proceedings under Section 75.

Paragraph (5) of the new act directs that all cases which have been dismissed because of the Supreme Court's decision holding the old act unconstitutional are to be reinstated, without any additional filing fees or charges. If, in the interval between the order dismissing the old proceeding and the filing of a petition for reinstatement under the new act, secured creditors have succeeded in realizing upon their security by a final decree, they presumably will not be affected. Indeed, a Federal District Judge in Missouri has held that this provision "is not to be construed so as to require the reinstatement of a case in which there had been a final order of dismissal as to any secured creditor, as a result of which the secured creditor has *incurred expense and assumed obligations* because of which it would be prejudiced by an order of reinstatement."[18] It is not likely that many courts will go that far. In that case the mortgagee had further prosecuted his foreclosure proceedings after the order of dismissal, but it is not shown that he had obtained a final decree.

Paragraph (5) likewise provides that "a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section." Thus a farmer may invoke Section 75, even though he has been granted a discharge in bankruptcy within the past six years. It is to be supposed that he will be entitled to another discharge, after complying with the provisions of Section 75. Some mortgagees have expressed the fear that they may be harassed by farmers filing a petition under Section 75 for composition and extension, thus staying foreclosure proceedings, but who then take no further steps and permit their petition to be dismissed, and then wait until the mortgagee takes up his foreclosure proceedings again, whereupon the debtor will again file a petition

family." By amendment of August 28, 1935, the exact opposite is provided.

14. 79 Cong. Rec., Aug. 19, 1935, pp. 14101 et seq.

15. In re Borgelt, C. C. A. 7th, Ill., Nov. 23, 1935, Commerce Clearing House Bankruptcy Service, No. 3717; In re Hilliker, 9 Fed. Supp. 948 (D. Ct. S. D. Cal., Feb. 11, 1935); In re Samuelson, (Dist. Ct. S. D. Iowa, Sept. 26, 1935) 8 Fed. Supp. 473.

16. C. C. A. 7th, Ill., Nov. 23, 1935, CCH, Bankruptcy Service No. 3717.

17. 10 Fed. Supp. 113.

18. In re Ledwidge, U. S. Dist. Ct., W. D. Mo., Nov. 1, 1935, CCH Bankruptcy Service No. 3716.

under Section 75, let that be dismissed, and so on *ad infinitum*. They should have no fear on that score, however, for clearly the second petition would not be filed in good faith, and an injunction against the debtor's filing subsequent petitions might well be granted.

The new act applies to all debts, and is not limited to those contracted prior to its passage, as was the case under the old act. Making the act prospective as well as retroactive will not, of course, make the enactment constitutional if, as applied to old debts, the present act is found to violate the Fifth Amendment. The purpose of including future debts in the new act, according to Representative Lemke, was to obviate the difficulty presented by having a person "partly in bankruptcy and partly out."[19] Debts incurred after passage of the act were not included in the first Frazier-Lemke Act because it was feared that to do so would make it difficult for the farmer to get credit in the future. Whether it will now have that effect remains to be seen.

We reserve for consideration *infra* the effect of the final paragraph of the new act, which reads: "This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate." The entire Section 75 will by its terms expire on June 28, 1938.

Two amendments to other parts of Section 75, adopted simultaneously with the new subsection (s), will affect the interpretation to be given the New Frazier-Lemke Act. Confusion previously existed among the District Courts as to who is a farmer. Section 75 (r) now defines him as "not only an individual who is primarily bona fide personally engaged in producing products of the soil, but also any individual who is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations, and includes the personal representative of a deceased farmer; and a farmer shall be deemed a resident of any county in which such operations occur." It was pointed out in the *Radford* case that the old act "affords relief not only to those owners who operate their farms, but also to all individual landlords the 'principal part of whose income is derived' from the 'farming operations' of share croppers or other tenants; and, among these landlords, to persons who are merely capitalist absentees." The present act goes even further, for it provides in addition that "The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such may join in one petition." It is to be supposed that the "partnerships," etc., must be farming partnerships.

The provision granting the benefits of the act to decedents' estates may prove of little value, if under the state law the probate court has no authority to authorize a personal representative to make the contracts which would be necessary in effecting a composition or extension proposal.

Another cause of much divergence of opinion and holding under the old act was the question of what was included in the term, "the debtor's property."[20] Conditional sales and deeds of trust gave particular trouble, as did the question of what the debtor's property was at the various stages of foreclosure proceedings. The 1935 amendments leave little doubt as to what is included. Subsection 75(n) reads:

> "The filing of a petition . . . or leaving it with the conciliation commissioner for the purpose of forwarding the same to the clerk of court, praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.
>
> "In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. . ."

That subsection is not a model of good draftsmanship, but one thing is clear—it is intended as a catch-all which will include every interest which conceivably could be considered as the property of the debtor, and possibly some which cannot fairly be said to be the debtor's property, of which more in another connection.

In the light of these provisions of the new Frazier-Lemke Act, is it constitutional? The most indefensible feature of the old act is no longer present; that is, exclusive right in the debtor to buy the property, and at a price which the mortgagee had no part in fixing. The mortgagee may now demand a public sale, when the mortgagor offers to buy the property, and the mortgagee may protect his rights by bidding at that sale; likewise his lien is preserved until the security has been realized on by sale. Upon the most charitable construction of the new act, it does no more than effect a three year moratorium on the enforcement of security, so far as secured creditors are concerned. May Congress, under the bankruptcy power, do this?

In the first place, is the new Frazier-Lemke Act a law "on the subject of Bankruptcies," within the meaning of Article I, Section 8 of the Constitution? Until the recent amendments our bankruptcy laws have contemplated immediate distribution of the debtor's property among his creditors; the sole function of the Frazier-Lemke Act is to *prevent* distribution for a period of three years. Nevertheless, as was pointed out in the *Radford* case, the provisions of the bankruptcy laws have been progressively broadened from time to time, and the scope of the power conferred upon Congress to enact bankruptcy laws is not necessarily limited to that heretofore exercised. Certainly, the act does deal with the relations between insolvent debtors and their creditors, and hence is a law "on the subject of Bankruptcies."

19. 79 Cong. Rec., Aug. 23, 1935, p. 14628.
20. See John Hanna, "The Frazier-Lemke Amendments to Section 75 of the Bankruptcy Act" (1934) 20 A. B. A. J. 687; F. Carlisle Roberts, "Property, Mortgaged Land, and the Frazier-Lemke Act" (1935) 13 North Carolina L. Rev. 291.

But the bankruptcy power is subject to the Fifth Amendment.[21] "Due process," particularly when employed to determine the dividing line between invasion of substantial property rights and remedy merely, is largely a question of more or less. And whether it is more, or less, will in turn largely be determined by what we have become accustomed to. Actually, Section 77, providing for railroad reorganization, which has been held constitutional by the Supreme Court,[22] and Section 77B, providing for corporate reorganization, invade the rights of creditors to a much greater extent than does the Frazier-Lemke Act. But behind those sections are years of equity receiverships in which exactly the same things have been done. From the equity receivership reorganization precedents, the transition into reorganization bankruptcy is an easy step. And, in addition, there are valid distinctions between the situation presented by insolvent railroads and large corporations, on the one hand, and insolvent farmers on the other. Everybody knows that the property of the former cannot be put on the block and sold in such a manner as to realize anything for creditors, while holders of mortgages on farms face no such practical impossibility of realizing on their security. Further, Sections 77 and 77B contemplate such liquidation as the circumstances permit, at the earliest possible moment; whereas the Frazier-Lemke Act holds off secured creditors for a fixed period of three years, not for the purpose of thereby enabling creditors to realize more thereby, but solely for the benefit of the debtor. Mr. Justice Brandeis recognized these distinctions clearly when he said in the *Radford* case that "in ordinary bankruptcy proceedings and in equity receiverships, the court may in its discretion order an immediate sale and closing of the estate; and it (the argument) ignores, also, the fundamental difference in purpose between the delay permitted in those proceedings and that prescribed by Congress (in the first Frazier-Lemke Act, and true of the new act). When a court of equity allows a receivership to continue, it does so to prevent a sacrifice of the creditor's interest. Under the Act (Frazier-Lemke), the purpose of delay in making a sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee."

The authors of the new Frazier-Lemke Act obviously were relying upon the *Blaisdell* case,[23] in which the Supreme Court upheld a Minnesota mortgage moratorium law as being a valid exercise of the police power of the state, justified by an emergency. But Congress has no police power, and cannot violate the Fifth Amendment under the plea of emergency. "Extraordinary conditions do not create or enlarge constitutional power," said Mr. Chief Justice Hughes in the *Schechter* case.[24] In addition, there are distinguishing features in the actual provisions of the new Frazier-Lemke Act and the Minnesota statute. For, while the Minnesota law merely authorized the courts to extend the period of redemption from mortgage foreclosure sale for such period as might be just and equitable, not to exceed two years in any event, and with a further provision for shortening the stay originally ordered in the event of change of circumstances,[25] the Frazier-Lemke Act requires an automatic stay, regardless of the circumstances of the case, and for a fixed period of three years.

The new act does declare that it is an emergency measure, and that "if in the judgment of the court such emergency ceases to exist *in its locality*, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate." If Congress had stopped with stating that it was an emergency measure, perhaps the stay would not have been inflexible, because, under the rule of *Chastleton Corp. v. Sinclair*,[26] it would cease to be effective on the termination of the emergency relied upon to justify the act. But the provision does not make the three year stay dependent upon the continuance of a national emergency, but rather upon the continuance of the emergency "in the locality" in which the court sits. The provision is plainly unconstitutional. A bankruptcy law operative in the Dakotas and not in the Carolinas, in one county in a state and not in another, lacks that geographical uniformity required by the Constitution. It may be that this unconstitutional provision is a separable part of the act,[27] and hence the remainder of the act would not necessarily fall with it. But with that provision out, we are back to the original objection that the three year stay is a fixed period, and Congress, by including the provision, has negatived the implication of the rule of the *Chastleton* case, *supra*. And it was on the ground of flexibility of the stay that the Supreme Court, in the *Radford* case, distinguished the *Blaisdell* case.

The new Frazier-Lemke Act apparently differs from the Minnesota statute in another, and perhaps also fatal, particular. Most state laws which provide a statutory period for redemption by the mortgagor from foreclosure sale, likewise give lienors of the mortgagor a further period within which to redeem if the mortgagor does not. This, of course, is a property right in the lienors. The Minnesota statutes merely extended the time within which the mortgagor might redeem, and expressly provided that in default of his doing so "holders of subsequent liens may redeem in the order and manner now provided by law"; if neither mortgagor nor his lienors redeemed within the extended time, the purchaser at the foreclosure sale, who held a certificate in the meantime, would be entitled to a deed. What is to happen, with reference to these matters, under the new Frazier-Lemke Act, is not at all clear.

Subsection 75(n), set out *supra*, contains the only definition of "the debtor's property," and the only reference to extending the period of redemption, to be found in the entire enactment. That subsection was amended in the same bill which added the new subsection (s), and, of course, is to be referred to in construing the Frazier-Lemke Act. The new act provides that the debtor's "property" is to be appraised, and he permitted to buy it at that value at any time within the three year period, with the right in any secured creditor to demand a public sale, when the debtor offers to purchase. The first part of subsection (n) specifically states that included in the debtor's property is "the right or the equity of redemption where the period of redemption has not or had not expired" at the time of filing the petition. If we stop here, it would seem that the right to redeem would be appraised and the debtor

21. Louisville Joint Stock Land Bank v. Radford, *loc. cit., supra*, note (2).

22. Continental Illinois Nat. Bank & Trust Co. v. Chicago, R. I. & P. R. Co. 294 U. S. ——; 79 L. Ed. 642, 55 Sup. Ct. 595 (April 1, 1935).

23. Home Bldg. & Loan Asso. v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413, 54 Sup. Ct. 231, 88 A. L. R. 1481 (Jan. 8, 1934).

24. Schechter v. United States, 79 L. Ed. 888, p. 894. (May 27, 1935).

25. Chapter 339, Laws of Minnesota of 1933, p. 514; see the Blaisdell case, *loc. cit., supra*, note (23).

26. 264 U. S. 543, 68 L. Ed. 841, 44 Sup. Ct. 405.

27. So held in In re Slaughter, U. S. Dist. Ct., N. D. Texas, Oct. 12, 1935, CCH Bankruptcy Service No. 3621.

permitted to buy it at the appraisal value; or that it would be sold at public auction, upon request of the certificate holder, since he is at the least a secured creditor—if not, indeed, the owner of the property. But if this be the case, lienors of the mortgagor are deprived of their right to redeem if the mortgagor does not, for, while the act grants the debtor a further period of ninety days within which to redeem from the sale held at the demand of the secured creditor, no provision is made for redemption by lienors of the mortgagor.[28]

It may be, however, that nothing more is contemplated than that the period of redemption is merely to be extended for three years, at the end of which time lienors of the mortgagor may redeem if he does not, and the certificate holder gets his deed if neither debtor nor lienor redeems—in other words, the act merely "tolls" the running of the statutory period for redemption. The provision making this a possible construction is the second sentence of subsection (n), which states that "where, at the time of filing the petition, the period of redemption has not or had not expired . . . the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provision of this section." The difficulty with this construction is that it does not fit in with the apparent purpose of subsection (s). That subsection (the Frazier-Lemke Act) speaks only of appraisal of the debtor's property, and purchase by him. If it is not contemplated that he is to purchase the property on the new terms, but rather is merely given a longer time within which to redeem from the foreclosure sale, by paying the amount there bid, those who drafted the act have adopted a very round-about way of saying so. A more reasonable construction of the provision that "the period of redemption shall be extended . . . for the period necessary for the purpose of carrying out the provisions of this section" is that the period for redemption is to be tolled until the debtor has had an opportunity to propose a composition or extension, or, failing that, to invoke the Frazier-Lemke Act. That, of course, would be necessary, else the period for redemption might expire after the filing of the petition but before any orders were made by the court in the proceeding, leaving nothing in the debtor; and after he has invoked the provisions of the Frazier-Lemke Act, it still would be necessary that the running of the redemption period be stayed, otherwise it would expire before the time came for the debtor to "purchase" the property.

Aside from the effect upon rights of lienors of the mortgagor to redeem, however, it makes little difference, so far as constitutionality is concerned, which view we take as to what happens to the statutory redemption period under the act. Under either construction, the purchaser at the foreclosure sale is denied a deed to the property, or a refund of his money, for three years beyond the time when, under the state law, he is entitled to it. Thus we are not only back to the original question whether Congress may declare a three year moratorium on the enforcement of security rights, but are faced with the additional difficulty that a final decree of the state court has fixed the relative rights of the parties. The Circuit Court of Appeals for the Seventh Circuit, in the case of *In re Lowman*,[29] held the new act unconstitutional. After pointing out that "at the end of the three years and ninety days the mortgagee may receive exactly what he was entitled to under the completed adjudication according to the laws of the state at the beginning of that period," the court continued: "We think that in thus extending or tolling the period of redemption for three years beyond that fixed by state statutes, Congress exceeded the powers conferred upon it under the bankruptcy clause of the Constitution. We think that that clause does not give to Congress the right to alter the relative rights between the parties which have already been fixed by a final adjudication in a state court according to rules laid down in the state statute. 'Statutes providing for redemption from judicial sales constitute a rule of property in their respective states, and are binding upon the courts of chancery as well as law, and will be given effect in the federal courts.'"

While some states construe the position of the purchaser at foreclosure sale as being merely that of one offering to purchase the land, others consider the mortgagor's right to redeem a merely personal right which cannot be alienated and which must be strictly exercised.[30] In the latter states it is hard to see how the mortgagor can then be said to have any rights *in the land*, hence the Frazier-Lemke Act should not apply in such cases. The purchaser is not a creditor of the mortgagor, and the land is not the mortgagor's property.

It has been seen that the new act still denies to mortgagees two of the substantial property rights which the *Radford* case declared the old act invaded; that is, the right to determine when the sale should be held, subject only to the discretion of the court, and the right to control the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt. And now that property held under deeds of trust as security is specifically included under the new act, the invasion of the right to determine when sale shall be held, and to control the property meanwhile, is even more marked. In Virginia, for example, deeds of trust are the rule and mortgages the exception. Under the laws of that state the trustee under the deed of trust takes possession of the property following default, and thereafter sells the property at such time and place, and upon such terms and conditions, as he sees fit. The exercise of these rights is not subject to the discretion of any court, unless, of course, they were to be exercised in such an oppressive manner as to constitute a fraud upon the rights of the debtor, and thereby call for the interposition of a court of equity, which relief would have to be sought in an independent suit instituted for that purpose. For these reasons Judge Paul, of the Western District of Virginia, in the case of *In re Sherman*,[31] decided on Nov. 8, 1935, held the new Frazier-Lemke Act unconstitutional.

Nor is it likely that the Supreme Court will recede from the position taken in the *Radford* case. The first act contained more provoking features than the new act, but the mortgagee continues to be injured in the same manner with respect to denial of the right to say when the sale shall be held, and to have a receiver control the property in the meantime. Here, as in the *Radford* case, "the purpose of the delay in making sale and of the prolonged possession accorded the mortgagor is to promote his interests at the expense of the mortgagee."

(*Continued on page 70*)

28. In re Young, Dist. Ct., S. D. Ill., Oct. 21, 1935, 12 Fed. Supp. 30, held the new Frazier-Lemke Act unconstitutional on this ground, as well as on the ground that other objections in the Radford case had not been cured.

29. C. C. A. 7th, Nov. 15, 1935, CCH Bankruptcy Service No. 3680.

30. See Roberts, "Property, Mortgaged Land, and the Frazier-Lemke Act", *loc. cit., supra*, note (20).

31. U. S. Dist. Ct., W. D. Va., Nov. 8, 1935, CCH Bankruptcy Service, No. 3692.

WHICH ROAD FOR THE LEGAL PROFESSION?

Changes in the Status of the Organized Legal Profession Are Taking Place or at Hand in a Large Part of the Country—Bar Conceivably Presented with the Need for Decision as to the Paths Along Which the Profession Shall Proceed in Future—Antagonistic Ideas of Governmental, Political Control and an Independent, Self-Governing Profession—Prof. Laski's Proposal—Time to Take Stock and Act*

By Hon. William L. Ransom
President of the American Bar Association

DURING the past five months, it has been my privilege to see a good deal of the legal profession, on its home ground, in many parts of this country. Tonight I am happy to be among the men with whom I practice law and in a Bar Association to which I have belonged for many years. It is an honor to be here under the auspices of my friend and your friend Robert C. Morris, who has done and is doing so much to interest the younger lawyers, and the rank and file of lawyers, in the work of the organized Bar.

First I report to you that, wherever I go, among lawyers and Bar Associations, I find a lot of respect for the New York County Lawyers' Association, its membership, and the work of its Committees. Your Committee reports and Association action attract more attention than I had supposed, and probably more than any of you had supposed. This is as it should be, because your Association is the largest voluntary organization of lawyers in the United States, aside from the American Bar Association. With 6000 members, it is the largest Bar organization within any City or State, and is larger than the Bar organization of any State except California, where its 13,000 lawyers are members of the State Bar organization by force of law.

In a large part of this country, I find that many or most of the lawyers, and no small part of the press and the public, are thinking and talking about the better organization of the Bar—the Bar Associations, their structure, their work, their relationship to the administration of justice, their usefulness to the profession and the public. I am sorry that I cannot say that the subject of Bar organization is yet receiving similar thought and attention in this City, which has a tenth of all of the lawyers of the United States. A Committee of this Association has given a great deal of helpful study to the subject, but its reports have received more consideration outside this State than in it. Unless you have seen this manifestation of opinion at first hand, it may be difficult for some of you to understand what it is all about; and I certainly have difficulty in stating it to you in specific terms, within limited time. It seems to me to be a sense that something is expected of the legal profession which it is not completely fulfilling; that lawyers should think of their profession as a whole, within each State, and not merely as a lot of individuals practicing law; and that lawyers should think of their work as that of a profession, and not merely as a means of livelihood, and should accept and fulfill the responsibilities of a profession, as to its members and as to the public.

In view of what is taking place elsewhere in this country, I submit for your consideration that it is high time for the lawyers of this City to do some serious thinking about our profession—the same kind of thinking for ourselves that we do for our clients. An adequate and effective organization of the Bar seems to be at least as important and necessary in the largest cities as anywhere else in the country. In a great city like New York, I suppose that many of us become discouraged, at times, about the present and future of lawyers—the over-crowding of the profession, the difficult conditions under which lawyers live and practice law, the entrance to the profession of many who lack its standards and back-ground, the submergence of individuals as leaders and great firms emerge, the absence of a unified professional spirit and ideals. We have to face the fact that we do not practice law here under typical American conditions, and that the average New York lawyer does not occupy anything like the usual relationship to his community.

The more typical American lawyer as I have observed him, is very much a part of the life and the work of his community. He owns his home and usually a little land, may walk to his office, knows by first name the people he meets along the street, knows the men with whom he practices law, has a feeling of independence in spite of moderate fees and slow collections, and is called in to sit at the council table of every community project. He has time to read a little, play a little, and think a good deal. He takes part in the public affairs and politics of his town, sits in its school board, is active in its churches and lodges, is identified with its banks and industries, knows its people, and is all the while called upon for judgment as to its problems and for leadership in its public opinion, cultural life and community activities. His relationship to all these things is individual and personal, and he becomes the greatest individualist in America. He does not surrender his opinions to clients or political parties or Bar Associations; he thinks and speaks and acts and votes as he individually sees fit; and is generally a most useful and respected citizen, who has and deserves the confidence of his community as well as of his pro-

*Address delivered at the Annual Dinner of the New York County Lawyers' Association, at the Hotel Waldorf-Astoria, New York City, Saturday evening, December 14, 1935.

fession; and lately he has shown, in not a few States, a willingness to deal with the problems and duties of his profession as a whole. I do not for one moment suggest that, in any part of this country during the past few years, the life and work of the lawyers as a class have been any "bed of roses" or that the highest ideals of the profession have anywhere been completely realized; but I do suggest that we would not need to worry about the future of the legal profession in the United States, if it were left to the smaller cities and towns of this country and were not dictated by the conditions of life and practice in the few largest cities.

But what about the legal profession in the largest cities? What shall be the outlet for the ideals, the energies, the talents for public service, possessed by lawyers who do not have the characteristic American opportunities for individual relationship to their communities? How shall we give these lawyers, the younger lawyers from the time of their admission to the Bar, an opportunity to associate and work with other lawyers, to gain some sense of membership in a great profession, and to do something for distressed mankind in the respects which come within the province of the law and the administration of justice? Obviously the answer must chiefly be group action, not individual, because in the largest cities only the voice of groups is heard in behalf of constructive measures. For my own part, I conclude that the answer must be found along the lines of the better organization, the much larger membership, and the more effective action, of the organized Bar—the Bar Associations, local, State and National. The future of the legal profession in the largest cities depends, in my judgment, on the leadership of the Bar Associations in enlisting the support of the lawyers generally, particularly the younger men of the Bar, and in giving to the public the bases for genuine confidence in the integrity and independence of the legal profession.

Changes in the status of the legal profession as a whole, the organized legal profession, are taking place or at hand, in a large part of the country and perhaps in all of it. We could hardly expect the forms and routines, the unrelated and casual minority Associations, to remain as they traditionally have been; the surface and substance of things have too much changed. Conceivably there is already presented to the lawyers of the United States a choice of roads, a decision as to the paths along which the future of our profession shall proceed.

By some, the demand is made that the lawyers should be organized and operated as "a public profession" under the control of government. By others, it is maintained that the lawyers should voluntarily organize, discipline and govern themselves, as an independent and self-governing profession. Those who oppose the organization of the legal profession as a branch of government offer several procedures for self-discipline and self-government:

(1) The continuance of the local, State and National Associations about as at present, without relationship to each other, and with voluntary and selective membership, which in most instances brings in only a minority of the Bar; fewer than one-fourth of New York State lawyers belong to the State Bar Association; in the country as a whole, about 110,000 of the 175,000 lawyers belong to some Bar Association; but 27,500 belong to the American Bar Association.

(2) The adoption of the federation plan for bringing about some coordination of the work of the organized Bar; the federation of local Associations into the State Associations and of the State Associations, with or without the local Associations, on an autonomous basis, into the American Bar Association, through a representative House of Delegates; such a House of Delegates thereby representing a majority of the lawyers of the United States, without the necessity that a majority of the lawyers join the American Bar Association or that the American Bar Association cease to be selective in its membership.

(3) The adoption of integrated or inclusive Bar organizations, with the authority of the Courts or the legislature, in the several States, to which all lawyers belong as a condition of practicing law; with the local Bar Associations continued for local purposes and the State Bar Associations federated through a representative House of Delegates in the American Bar Association; eighteen States, with 38,000 lawyers, now have the integrated type of Bar organization, self-governing and self-disciplined.

In the nature of things, so long as the Federal Constitution endures and the States control the admission and conduct of lawyers, the American Bar Association will remain voluntary in type and selective in membership; the participation of the States in any federation through the American Bar Association will be voluntary and without loss of autonomy; and each State will decide for itself as to the type of organization it will have for its lawyers.

Let no one think that the idea of a governmental, political control of the legal profession may not come actively into the picture. In the November issue of *Harper's Magazine*, the distinguished professor of political science at the University of London, Mr. Harold J. Laski, who has taught at great American and Canadian universities, discusses "the decline of the professions"—medicine and law. For the decadent conditions which he finds in the legal profession, the brilliant professor offers a ready and complete solution. Possibly some of its features may not be lacking in appeal, to lawyers hard-pressed by lack of business and by shrinkage of incomes.

Under Professor Laski's suggestion for the organization of the law "as a public profession," the profession would become "a great corporation under government control, the members of which should work for the public on a fixed salary at fixed charges." Based on the experience of Soviet Russia, he suggests that this "immense reform" is "a practicable one." "The private lawyer" would be "replaced by a body of public servants." The lawyers would "have no financial interest in either the content or the number of their cases." Under control by government, each lawyer would be assigned to such clients and such cases, and maintain such contentions, as government conceived to be in the public interest. The ablest of lawyers might, in the whirl of the lottery wheel of assignment, draw numbers dictating that they give their time and talent to the traffic courts; and the humblest members of your Junior Bar might be allotted to the defense of great principles of human rights and individual liberties, if indeed the government permitted such principles to be maintained and defended at all. In

any event, all lawyers would stand equal before the law and before clients; selection of lawyers by clients would disappear; the maintenance or defense of clients' rights or interests would disappear, because clients would have no rights or interests; and in return for their submergence and the disappearance of the traditional profession, all lawyers would receive equal compensation from the public treasury. Naturally, under such a regime, the government would necessarily control, on some quota basis, who should be admitted to the profession and who should be excluded therefrom, and who should be dropped from the profession, at any age or stage of life after admission to the Bar.

The very recital of Professor Laski's proposal excites your laughter and seems absurd. Such a suggestion would have seemed just as absurd in Russia twenty years ago as it does to us here tonight. What has taken place as to the legal profession in Italy and Germany would have seemed absurd, if suggested in those countries fifteen years or less ago. Can we be sure that we are long exempt from this issue? Demand for the "socialization" of the medical profession has already been heard in the United States. Marching columns of men and women sing in our streets the song of revolution, "Arise ye prisoners of starvation"; professors and teachers refuse allegiance to our Constitution and form of government; only the red flag of the Internationale is displayed at great public assemblies in some of our cities. Speaking only for myself, it seems clear to me that in reality Professor Laski's suggestion is in full harmony and accord with social philosophies which we hear advocated from high places—some colleges and schools, some churches and government offices—in the United States today, and is consistent with some challenges which already have been made as to the rights and duties of lawyers and with some steps which have already been taken along the road that leads to the submergence of individual rights and human liberties.

What is the alternative to that road for the legal profession in America? Is it merely to let matters drift and muddle along as they are? Will such a course bring us past the signposts that lead to Professor Laski's highway?

If the lawyers of the United States do not want government to organize and control the legal profession, the lawyers better organize, govern and discipline it themselves, in the public interest. An independent and self-governing legal profession, that cannot be commanded by retainers, cajoled by public office, or intimidated and silenced by threats and charges against lawyers individually or against the profession as a whole, is one of the best safeguards of freedom in the United States. Those who seek to overthrow liberty under law and to substitute a socialized state, realize full well that one of their first steps must be to discredit and bring into disrepute the legal profession, because its members are intense individualists and the instinctive foes of mass tyranny in every form. Attacks upon the integrity and independence of the legal profession are already heard, from those who are unwilling that the policies and acts of government shall be kept within constitutional limits. In countries which have destroyed individual liberty, the advocates of a socialized state have sought a centralized and political control of the legal profession, even as they have sought a centralized and bureaucratic government, because it can more easily be seized by a daring minority and made the means of dominating an unresisting majority.

A vital element of strength and permanence of the legal profession, as at present constituted in America, is that it is separately organized in forty-eight States and is under the jurisdiction of the State Courts of forty-eight States, and cannot be subjected to a centralized National control, by government or by anyone else. For my own part, I do not go along with the idea that there should be one big Bar Association for the whole United States, with State and local branches and one set of dues for membership in all. I much prefer to see strong and active local Associations developed, with federation of the local Associations in the State Bar organizations, whether voluntary or integrated in type, and with the State Bar organizations, and perhaps also the larger local Associations, federated in a National House of Delegates of the legal profession, under the auspices of the American Bar Association. We should keep our local and State Bar organizations as the primary and self-governing units of the legal profession; should resist all efforts to make the integrated Bar or any type of Bar organization an adjunct of partisan activity or a means of political control of lawyers; should oppose every step towards regimentation of the lawyers of America; and should preserve at all hazards the independence and integrity of the profession of the law. This is no time to "close-herd" the lawyers of America.

We better be thinking about these things, in this City as in the rest of the country. It behooves us all to take stock of the situation, and to see what needs to be done and can be done, to put our own house in order as to its undesirable members and to serve better our profession and the public. We may well find out at which end of the procession the lawyers have been marching, and in which direction. We should not leave it to the occasional rebel or publicity-seeker in our ranks to grab the flag and win individual acclaim by demanding action in the public interest. The Bar Associations should be made fully representative of the profession, should be kept free of political control and intimidation, should be kept self-governing and self-disciplinary by the rank and file of the profession, and should ascertain and speak and, above all, *act*, in behalf of the best judgment of the profession as a whole. Even though mistakes be made, "intelligent action is preferable to inaction."

If you are in sympathy with these objectives, you should join your local and State Bar Associations and get into their work. Especially do I suggest that you join the American Bar Association, which is taking the lead along these lines. Decide and plan now to attend the next annual meeting of the American Bar Association, to be held in Boston on August 24, 1936, when many of these matters will come to the point of decision. I urge especially the attendance of the younger lawyers, and of the lawyers who have never come to one of these conventions before. It will be an interesting, notable and patriotic gathering of American lawyers, amid historic surroundings. The pending plans for a better and more representative organization of the American Bar seem to me to deserve the active support of the lawyers and the public, because they offer the best assurance for the future of an independent and outspoken legal profession in the United States.

THE AMERICAN CONSTITUTIONAL METHOD

That Method Is a Process of Adaptation and Growth, as well as a Means Whereby Wrongs May Be Corrected and Governmental Measures May Be Attuned to the Essentials of Justice, through the Orderly Ways of Discussion and Education—Steadying Influence of the Historic View—Propriety of Public Criticism of Court's Decisions on Constitutional Grounds—Question as to Enactment of Laws of Doubtful Constitutionality etc.*

By Hon. Homer S. Cummings
Attorney General of the United States

IN THE 147 years which have elapsed since its adoption the Constitution of the United States has probably been the subject of more controversey than any other great document of human history.

The framers of the Virginia-Kentucky Resolutions of 1798 took one view of its meaning, while the Federalists took another. The friends of the Bank of the United States thought that the Constitution conferred powers on the Federal Government which the opponents of the Bank, with equal earnestness, denied. The South Carolina Nullifiers of 1833 believed that a protective tariff was unconstitutional while Judge Story and Daniel Webster were firm in the opposite belief. After the close of the Civil War, the so-called Radicals thought that the new amendments conferred on the Congress power to protect civil rights within the several states, while their opponents gave to the amendments a narrower construction, which was afterwards confirmed by the Supreme Court.

And yet, in the face of this series of examples, which might be multiplied almost indefinitely, there is nothing more charactertistic of constitutional controversy than the recurrent assumption on the part of the disputants that their own construction alone, has a sole and exclusive title to correctness, and that whoever disputes that construction, or argues against it, is guilty of no lighter offense than that of laying impious hands on the Ark of the Covenant. This attitude is, perhaps, a natural consequence of man's insatiable desire for certainty, which he seeks to satisfy by convincing himself that he already has certainty in his grasp. This tends to increase the heat, as well as the scope of the debate. Men are apt to become irritated when they find their own certainties challenged, and to that extent shaken, by the existence of other and inconsistent certainties on the part of other men. But, as Mr. Justice Holmes admonishes us, "Certainty, generally, is an illusion and repose is not the destiny of man"; and it was George Meredith who, referring to this human frailty, exclaimed:

"Ah, what a dusty answer gets the soul
When hot for certainties in this our life."

The Constitution is a fundamental document, speaking for the most part, in general principles and couching its precepts in language designed to make possible the attainment of the great ends of government.

Mr. Justice Story, in delivering the opinion of the Court in *Martin v. Hunter,* 1 Wheaton, page 326, said:

"The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen, that this would be perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen, what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model, the exercise of its powers, as its own wisdom, and the public interests should require."

A similar thought was expressed by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. at page 407.

The process of constitutional construction relies for its validity on the relative weight to be given to this or that factor in a chain of inference. One mind will be impressed by the need of centralized power, another by the value of local self-government; one by immediate governmental necessities, another by the danger of governmental abuses; one by the rights of property, another by the claims of human sympathy; one by the sanctity of contracts, another by the requirements of essential justice. The interplay of these conflicting concepts, and the predominance of one or another at different periods of national development, are illustrated throughout the long history of judicial decisions and should serve to convince us that within the great house of the Constitution there are many mansions, and that the questions which are left open within its four corners are frequently susceptible of more than one solution based upon reason.

The Supreme Court does not operate in a legalistic vacuum of abstract propositions. On the contrary it is part and parcel of an organic process of government which comprises the constitution-making process, the legislative process and all the other processes through which, in a government resting on popular sovereignty, public opinion is enabled to register itself in governmental acts. Moreover, the cases which come before the Supreme Court are, for the most part, presented by the exigencies of litigation, not cases selected to round out the symmetry of a theory. Such cases are created by the accidents, or the pressures, or the changing ideals of national life. In this welter of facts and circumstances there is a

*Address delivered before the Association of the Bar of the City of New York, Dec. 18, 1935.

place for logic and the Court has applied it; but there is a place, too, for that "inarticulate premise" to which Mr. Justice Holmes referred when he deprecated "a system of delusive exactness."

Shifting national needs and maturing national ideals have, at times, resulted in reversals of previous decisions. At the outset the Supreme Court held that the admiralty powers of the Constitution extended only to navigable waters within the ebb and flow of the tide. This ruling excluded, of course, the Great Lakes; and it was reversed in 1852 in the leading case of *The Propeller Genessee Chief* (12 How. 443). Referring to the earlier decisions, Chief Justice Taney said:

"The conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States."

It was, perhaps, natural for the courts of the United States, in an early period, to adopt the limited definition, for until the invention of the steamboat there could be nothing like extended navigation upon waters with an unchanging current resisting the upward passage, but the Chief Justice went on to point out that at the time of such decisions

"the commerce on the rivers of the West and on the lakes was in its infancy and of little importance and but little regarded compared with the present day."

Another instance in which the Court, during the same period of its history, reversed its previous holding has to do with the question of whether foreign corporations have a right of access to the Federal Courts under the diversity of citizenship provision of the judiciary article of the Constitution. The original rule laid down by Marshall in *Bank of United States v. Deveaux* (5 Cranch. 61) was that a foreign corporation had no such right, unless all its stockholders were citizens of a State other than that of the opposing party in the suit. This decision was reversed in 1844 in *Louisville, etc., R. R. v. Letson* (2 How. 497), which held that, for the purpose of a suit in a Federal court, a corporation must be presumed to be a citizen of the State in which it was incorporated. The Court said in its opinion that the old cases "had never been satisfactory to the Bar" nor "entirely satisfactory to the court that made them." The vast growth and extension of the corporate method of doing business had obviously produced its effect on the judicial mind.

Instances in quite recent years of definite reversals by the Court of important decisions in the field of taxation come readily to mind, notably *Blackstone v. Miller* (188 U. S. 189), overruled in *Farmers Loan Company v. Minnesota,* (280 U. S. 204-209) and *Long v. Rockwood,* (277 U. S. 142), overruled in *Fox Film Corporation v. Doyal,* (286 U. S. 123).

The history of the Court is not free from examples of reversals, or substantial modifications, of its position in cases involving issues of far wider public interest and more general controversy than those which I have mentioned. An outstanding illustration was the important modification of the doctrine of the *Dartmouth College* case, after a change in the personnel of the Court, by the *Charles River Bridge* case. The *Dartmouth College* case had held that a corporate charter was an inviolable grant which could not constitutionally be impaired by subsequent legislation. The question raised in the *Charles River Bridge* case was whether the constitutional guarantee extended beyond the express terms of the grant to the implications of exclusiveness to which it owed, in large measure at least, its financial value. When the case was first argued in 1831, while Marshall was still Chief Justice, the Court apparently had no doubt that the guarantee did cover such implications. When the case was finally decided six years later, however, the ruling was to the opposite effect, over a strong dissent from Judge Story. It was in this case that Chief Justice Taney voiced the memorable sentiment:

"While the rights of private property are sacredly guarded we must not forget that the community also have rights and that the happiness and well being of every citizen depends on their faithful preservation." (*Charles River Bridge v. Warren Bridge,* 11 Peters 420 at 548).

It was this decision which called forth from Judge Story the gloomy remark that "The old constitutional doctrines are fast fading away and a change has come over the public mind from which I augur little good." (Warren's History of the Supreme Court, Vol. 2, page 302). In his dissenting opinion he said that the very raising of the contentions which had received the support of the majority of the Court was "sufficient to alarm every stockholder in every public enterprise of this sort throughout the whole country." Daniel Webster complained that "the decision has completely overturned a clear provision of the Constitution" and reported that "Judge Story thinks the Supreme Court is gone and I think so too, and almost everything else is gone or seems rapidly going." Chancellor Kent wrote that he had reperused the *Charles River Bridge* decision with increased disgust and, that "It abandons or overthrows a great principle of constitutional morality. . . . It injures the moral sense of the community and destroys the sanctity of contracts."

Yet, within fifteen years, a later Judge, who was himself no ineffective defender of property rights, speaking of this decision was able to say, "No opinion of the Court has more fully satisfied the legal judgment of the country and consequently none has exercised more influence upon its legislation." (Campbell, J., in *State Bank v. Knopp,* 16 How. 409).

A more recent instance in which the Supreme Court, on an issue of great public importance, originally took a position from which it was later to recede is afforded by the famous *E. C. Knight* case (156 U. S. 1 (1895)), the first to come before that tribunal under the Sherman Anti-trust Act. It was held that a monopolistic combination of manufacturers could not be constitutionally reached by the anti-trust laws since manufacture was not commerce and, therefore, was exempt from control by the Congress. The decision, while it stood, effectively paralyzed the operation of the anti-trust laws for a number of years and drew sharp criticism from many commentators. One of them, writing in the American Law Review in the year when the decision was handed down said that "The Sugar Trust decision and the Income Tax decision," —rendered the same year,—"counter-balance all the good the Court has done in seventy years and inflict a wound on the rights of the American people." Within a few years, however, the Court reconsidered its position and held that while the Sherman Act might affect local conditions it could nevertheless be constitutionally applied even to transactions local in character if they operated to effect a restraint on interstate commerce. (*Northern Securities Company v. United States,* 193 *U. S.* 197 (1904)). This decision revitalized the anti-trust laws and rendered them, once more, serviceable.

The outstanding instance in which the Supreme Court has reversed itself was when, in the Legal Tender cases (12 Wallace 457 (1871)), it overruled its prior decision in *Hepburn v. Griswold* (8 Wallace 603 (1870)). The Hepburn case, which was decided by

a vote of four to three, represented a recognition, in the minds of a majority of the Court, of a body of economic doctrines resulting from the contact of certain economists with the bullion question as it had presented itself in England at the close of the Napoleonic wars. The economic soundness or unsoundness of these doctrines was, no doubt, a question of importance for legislative consideration. To read them, however, into constitutional requirements, as the majority of the Court did, imposed an unwarranted limitation upon an essential power of sovereignty. The decision met with some favor on economic grounds, but even its supporters referred to "the impropriety of taking from Congress and committing to a Court of Justice a task so plainly legislative in its nature."

The New York Times stated that "The effect of the decision if allowed to stand strips the Nation of one of its means of warfare and defense."

The doctrines of the *Legal Tender Cases* were reaffirmed, in the broadest terms, twelve years later in *Juilliard v. Greenman*, (110 U. S. 421), with but one dissent; and, in the recent Gold Clause cases, they have been extended still further. In numerous instances, without overruling particular decisions, the Court has shifted its emphasis from one class of guiding considerations, to another. The trends which lawyers attempt to deduce therefrom are, of course, of the utmost importance in determining the law for future cases and in advising clients in pending matters.

Nevertheless, the history of the decisions indicates that few such trends have been sufficiently continuous to supply a basis of certainty as to their indefinite projection into the future. On the contrary, there has been, naturally and properly, an ebb and flow, with a conspicuous lack of basis for assurance as to when the ebb will cease and the flow set in.

Outstanding examples are to be found in the construction of the commerce clause, from *Gibbons v. Ogden* (9 Wheat. 1) to *Leisy v. Hardin*, (135 U. S. 100); and the course of decisions in cases of legislative price fixing from *Munn v. Illinois* (94 U. S. 113), to *Nebbia v. New York* (291 U. S. 502). In *Gibbons v. Ogden* the Court had plainly indicated its view that the Federal Power to regulate interstate commerce is exclusive, with the result that all regulation of such commerce by the States is invalid. In the *License Cases*, (5 How. 504), however, the Court upheld a State regulation of liquor imported from other States. A satisfactory line of demarcation between State and Federal police regulations seemed ultimately established by *Cooley v. The Port Wardens*, (12 How. 299), but this line was again unsettled by *Leisy v. Hardin*, supra, which once more cast doubt on the validity of state regulations affecting articles moving in interstate commerce.

The relation of legislative price fixing to the due process clause seemed settled, on the basis of public interest from the time of the *Munn* case in 1876 to *German Alliance Ins. Co. v. Kansas*, (233 U. S. 389), in 1914, but there followed, in the nineteen-twenties, a series of cases like the *Employment Agency Case* (*Ribnick v. McBride*, 277 U. S. 350), and the *Theatre Ticket Case* (*Tyson v. Banton*, 273 U. S. 418), which seemed to stand for some narrower doctrine, until the authority of the earlier decisions was reestablished and extended, two years ago, in the *Nebbia* case.

Shifts in the trend of the Supreme Court's opinions have been noted by the great commentator on American institutions, James Bryce. He says:

"The Supreme Court has changed its color, i. e., its temper and tendencies, from time to time according to the political proclivities of the men who composed it. . . Their action flowed naturally from the habits of thought they had formed before their accession to the bench and from the sympathy they could not but feel for the doctrines on whose behalf they had contended." (American Commonwealth, 3d Ed., Vol. 1, pp. 274-5.)

And again,

"The Supreme Court feels the touch of public opinion. Opinion is stronger in America than anywhere else in the world and judges are only men. To yield a little may be prudent, for the tree that cannot bend to the blast may be broken. There is, moreover, this ground at least for presuming public opinion to be right, that through it the progressive judgment of the world is expressed." (Bryce, ibid., p. 273.)

In view of the close and inevitable connection which thus exists between the questions which the Court has to decide, and the great issues which agitate public opinion, it is not unnatural that the decisions and doctrines of the Court should be the subject of wide-spread public interest. The Constitution is supreme simply because it expresses the ultimate will of the people. The people are, accordingly, the masters of the Constitution and their mastery is expressed in the power of amendment, which, it must not be forgotten, is as much a part of the Constitution as any other provision. This power has been exerted three times in our history for the deliberate purpose of overriding a previous decision of the Supreme Court.

The first instance occurred at the very commencement of our government when the Eleventh Amendment prohibiting suits by private parties against a State was adopted to undo the effect of the decision of the Supreme Court in *Chisholm v. Georgia* (2 Dallas 419). The latest instance was the adoption of the Sixteenth Amendment to make a federal income tax possible over the decision of the Supreme Court *in Pollock v. Farmers Loan & Trust Co.*, (158 U. S. 601). The other instance was the adoption of the Thirteenth Amendment to undo the effect of the Dred Scott Decision (19 How. 393).

In discussions of our constitutional system there is no occasion to hurry over the Dred Scott Decision with averted gaze. It holds a lesson for us. Newspapers of the time spoke of the decision as "exerting the most powerful and salutary influence throughout the United States", as "a closing and clinching confirmation of the settlement of the (slavery) issue", and as exerting "a mighty influence in diffusing sound opinions and restoring harmony and fraternal concord throughout the country." In connection with no other opinion was there ever a greater effort, on the part of those who agreed with it, to misrepresent all public expressions of disagreement as blows aimed at the judiciary. And yet, as we look back upon that controversy we cannot doubt that the discussion was salutary, nor can we help feeling that the sound American attitude was that which was expressed by Abraham Lincoln when he said:

"But we think the Dred Scott Decision is erroneous. We know the Court that made it has often overruled its own decisions, and we shall do what we can to have it overrule This." (Speech at Springfield, Ill., June 26, 1857.)

And, again, in his first inaugural:

"The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people would have ceased to be their own ruler, having to that

extent practically resigned their Government into the hands of that eminent tribunal."

In a time of Constitutional discussion like the present, when once again, as in so many preceding periods, clashing interests and conflicting ideals are pressing for expression in Governmental action, and seeking to clothe themselves with the mantle of constitutional sanction while fixing the stigma of unconstitutionality on their opponents, it is well for us, as lawyers, to resort to the steadying influence of the historic view. Such consideration should shield us from ill-considered conclusions on, at least, two questions which, for the moment, seem to be creating much confusion of thought in both professional and lay minds.

The first of these has to do with the propriety of public criticism of the decisions of the Courts on constitutional questions.

It seems clear, from the fragments of history to which I have adverted, that such discussion has gone on from the beginning of our Government, and has repeatedly affected the character of judicial decisions or has expressed itself in the form of constitutional amendments. Of course the fact that such criticism has occurred and has produced results is, of itself, no justification of its propriety. If the Constitution imposes, in all instances, a clear and specific mandate upon the judges, leaving them no discretion, and no room within which reasonable men may differ, then obviously any criticism of decisions so compelled would be grossly misdirected. What I have said should sufficiently indicate, however, that on many great constitutional issues decisions are not thus inexorably required by the Constitution. They proceed rather from a chain of inferences and intermediate reasoning the result of which depends upon the relative weight which one mind or another may give to a variety of competing considerations. If, as Bryce has pointed out in the passage I have read, these considerations are in part drawn, not from the mere private preferences of the judges as individuals, but rather from the impressions produced on their minds by the general public sense of what is just and what is necessary in the public interest, then such public discussion, so far from being unfair to the judges and a hindrance to the performance of their duties, is, on the contrary, an important and valid aid in acquainting them with some of the weighty factors which properly enter into the process of decision.

The second question, is whether the Legislative branch of the Government, and the Executive, in view of their oath to support the Constitution, may rightfully take any action or join in the enactment of any law, the constitutionality of which is doubtful. It has been argued that should the Executive, or a member of the Congress, have serious doubt whether a proposed enactment is constitutional, he would violate his oath of office by assenting to it or voting for it.

This argument rests on a misunderstanding as to the form and nature of the Constitution and as to the function of the Supreme Court with reference thereto. If we are aware, as all students of the Constitution must be, of the sweeping language in which its provisions are couched, and of the variety of considerations to which the Supreme Court must give weight, it seems clear that practically no new legislation of a controversial character can ever be said to be free from constitutional question. Indeed, the only legislation as to which no doubt can exist is an enactment substantially identical with some previous statute already approved by the Supreme Court; and even here there is the possibility of error in view of the fact that the Court has frequently reversed itself. The theory that any member of the Congress violates his oath who votes in favor of legislation not free from constitutional doubt would entirely exclude the possibility of legislation in new fields or of novel character.

As heretofore indicated, constitutional objections have been raised as to nearly every important piece of legislation enacted since the beginning of the Government. The constitutionality of a protective tariff was questioned when the first tariff act was proposed and was bitterly debated for many years; the constitutionality of national banks was contested; the constitutionality of Federal expenditures for internal improvements, roads, canals and railways, was vigorously assailed; the constitutionality of the Interstate Commerce Act was the subject of long discussion; and the constitutionality of the Acts establishing the Department of the Interior and the Department of Agriculture was vehemently denied. Speaking of the bill to establish the Interior Department, John C. Calhoun said:

"This monstrous bill will turn over the whole interior affairs of the Government to this Department and it is one of the greatest steps ever made to absorb all the remaining powers of the States."

Certainly, no one, however, who is familiar with our history, and assuredly no lawyer, would undertake to argue that, because the Court ultimately determined that a particular enactment was constitutional, there was no reasonable ground for doubt at the outset. President Taft, for example, vetoed the Webb-Kenyon Act on the ground that his oath of office did not permit him to give his assent to an Act of doubtful constitutionality. In fact, he went rather far in admonishing the Congress as to its duty in the premises. The Act, however, was passed over his veto, and, in due course, the Supreme Court pronounced it constitutional. (*Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311).

The doctrine expressed by President Taft would, if applied, require that doubts be resolved by the Congress adversely to constitutionality, thereby bringing many essential processes of the government to a standstill.

If no Act of the Congress of doubtful constitutionality were ever passed, the Supreme Court would have little or no occasion to exercise any function in the matter of constitutional interpretation.

The correct course would seem to be that the executive and the members of the legislative branch, when not clearly convinced of the unconstitutionality of a measure otherwise desirable, should not necessarily regard themselves as thereby deterred from enacting it, but should consider the advisability of leaving the doubt to be determined where it can be determined authoritatively, namely by the Supreme Court. This was the position of Senator Fessenden of Maine in the debate on the Legal Tender Acts, when he said:

"I have not touched the constitutional question. * * * We may well leave that question to be settled by the courts, and not attempt to settle it ourselves." (57 Congressional Globe, 767.)

It was, also, the position of Madison during the first Congress when called upon to vote on the bill for the encouragement of the cod fisheries. Madison felt that the bill was unconstitutional in certain respects, and favored an amendment to eliminate such provisions. The amendment failed, and it is interesting to note that notwithstanding his conscientious view

that the bill was in the main probably unconstitutional, he nevertheless voted for it on its final passage.

As has been heretofore noted Lincoln was not prepared, in certain instances at least, to let such a question rest, even after the Supreme Court had spoken.

Of late, however, we have been confronted with the further assumption that a correct understanding of the meaning of the constitution is revealed not merely to the Supreme Court, but to certain individuals who, from time to time, deplore the course of events and express an exaggerated anxiety as to the safety of our institutions. The precise meaning of the Constitution becomes, therefore, the particular meaning which they, as an esoteric group of specially endowed individuals, have elicited by their own efforts and their own processes of inference from the previous decisions of the courts. This would seem to present a somewhat novel phenomenon in the matter of constitutional interpretation. It may well be asked, however, what intellectual, professional, or political right has any individual, or any group of individuals, thus to proclaim in advance, and as if from on high, a constitutional interpretation which can be authoritatively supplied only by the Supreme Court itself, which has so frequently confounded by its decisions, the forecasts and opinions of Congresses and Presidents, as well as of private critics and commentators?

The absolute theory of one and only one rational construction of the Constitution renders impossible any proper understanding of the nature of our American constitutional method and of the functions of our Supreme Court.

With us, the people have established a constitution which is supreme over all the acts of Government, legislative, executive, and judicial alike, because it is the highest expression of the popular will. Of necessity, it employs broad language which leaves a wide area for legitimate differences of opinion. Within this arena of debate all voices must be heard. The courts may give, and as a rule do give, less weight to what they feel to be temporary currents of opinion, casual pressures for reform, evanescent aspirations or momentary ideals as contrasted with what they may properly regard as the confirmed and enlightened sense of justice developed by the changing life of a vital and growing nation.

If the courts prove mistaken in their reading of this ultimate will, or if the Constitution itself in some clearly expressed provision no longer conforms thereto, then, by its very terms, the people are guaranteed the right to make their desires effective through the solemn process of amendment.

Our Government is not a logical, a documentary, a political or a judicial absolutism. The American constitutional method is a process of adaptation and growth, as well as a means whereby wrongs may be corrected and governmental measures may be attuned to the essentials of justice, through the orderly ways of discussion and education, as opposed to the violent changes and intolerable tyrannies by which absolute governments are inevitably characterized. Were this not true the Constitution would be a dam against which the waters of life would beat in vain, rather than a directing channel through which the stream of national existence may safely pass.

Missouri's Accomplishments

(*Continued from page* 14)

ministration of justice equal to or that approaches the system developed by the English and American lawyers. In England the Bar has maintained its preeminence because of its efficiency in the field that it was developed to occupy. In America it is fast losing its influence because of commercialism injected into it by laymen. In the legislative halls before commissions, in the commercial world, the urge continuously is that laymen are more efficient than lawyers; that college professors trained in the specialized field of sociology or economics can draft better legislation; that engineers and lay specialists on commissions can better administer our utility laws; that lay agencies can better serve the commercial world; or lay insurance adjusters better serve the insurance world than can lawyers. The very courts are urged to destroy precedent and the constitution and to decide cases according to the present idea of public necessity or expediency. We are boldly met with the challenge that the legal profession as it now exists no longer serves a changing time.

No profession can exist that does not protect its own integrity, within its ranks and from encroachment from without. The question therefore, ladies and gentlemen, of the suppression of the unauthorized practice of law is vital to the very existence of the legal profession in this country. Unless it is suppressed and the public brought to knowledge of the fact that the practice of law must be confined to those trained in the profession, the Bar as it today exists in this country must pass into oblivion.

Should the American Bar continue to exist? Should the American Government as constituted today continue to exist? Do you members of the Bar of the South believe that the government that we have created in this Country through the instrumentality of our profession and that we have maintained through that same instrumentality should pass out of existence? You who have given us many of our leaders whose monuments are our institutions of government?

I was born and reared to respect the traditions of the South. In my mind there was early instilled the belief that southern men placed honor above selfishness and ideals above money. That true worth was measured by the sacrifice one was willing to make in the advocacy or defense of his principles. The passing of the years has not effaced from memory the teachings of my youth.

We who come of forebears from among you and who were reared to believe in your idealism and your self-sacrifice for principle, call upon you to join with us in saving the integrity of our profession, to join with us in protecting that profession that is the life of our institutions of Government from the encroachments of those who commercialize its purposes, who destroy its influence, who render it impotent for performing its functions in the protection of our people and in the maintenance of our Government.

The Supreme Court of Missouri has answered the call of the American Bar Association. Under its direction we have raised the standard of our profession. Around that standard we have rallied for its defense. We call upon you who have so much in common with us to act with us in the protection of that profession, to aid in restoring it to its position of influence, to aid in preservng it for the future generations, for the sake of the public, for the preservation of the government which it has brought into existence, which it has defended from every danger, and which as its guardian it must continue to defend in the future.

TRUSTEE ETHICS

The Individual Trustee in Boston in Earlier Days—Movement by the Banks of the Country to Take on Trust Work—Four Classes of Banks Undertaking to Do This Kind of Business—Unlawful Practice of Law by Trust Departments of Banks in Many Different Parts of the Country—Court Decisions Evidencing This Fact—Significance of Codes and Agreements—Proper Standard for a Trust Officer*

By STOUGHTON BELL
Chairman of Committee on Unlawful Practice of the Law of the Bar Association of the City of Boston

THIS year we are celebrating in Boston the 300th anniversary of the establishment of Boston Common. Next year we shall celebrate the 300th anniversary of the founding of Harvard College. If we were to celebrate the 300th anniversary of the establishment in Boston of the first individual trusteeship as a separate institution or profession, that celebration would take place within a very few years. From the beginning the highest type of individual trustee was a man of established position in our community—a man usually learned in the law who withdrew from the active practice as the volume of his trusteeships grew, often to many millions of dollars. The individual trustee not only handled the property of his clients, investing and reinvesting it as to him seemed best, but frequently he was more than the confidential adviser of the client and his entire family—he was or soon became a member of the family circle. He was a man of unquestioned integrity and good judgment. I am, of course, referring to that group of lawyers among those handling trusts who from training and constant application were qualified. He organized his office with advisers and accountants who were experts not only in securities but who knew real estate. Many of the larger of these trusteeships were invested solely in real estate. In fact a large part of down-town Boston is today held by such individual trustees.

This then is the picture that confronted the banks in Boston when they first considered establishing trust departments. This was the competition that confronted them. It was not then considered as competition. Many of the individual trustees in this group were on the boards of directors of the various banks. They recognized that there was a field for the banks that they as individuals had not touched. It well may be that as they themselves were getting on in years they thought it well to have a more permanent organization to handle these great responsibilities.

All this tended to set a high standard for the banks that were proposing to go into the trust business. It however led to a misunderstanding of the banks' powers. These individual trustees were lawyers accustomed to do all the legal work connected with their trusts, with the result that when they gave to the banks the benefit of their experience and often did the legal work in connection with the new departments, it was perhaps natural that they should not have explained to their lay brethren in the bank the fine line of demarcation between the business and the legal work to be done. Of this I shall speak again.

This movement by the banks of this country to take on trust work is of comparatively recent origin. To be sure it dates back to 1822 when the State of New York gave trustee powers to the Farmers Fire Insurance & Loan Company. But fifty years later there were only thirty-five trust companies reported by the Comptroller of the Currency and of these five were in Massachusetts. Even in 1900 there were only five hundred trust companies that were exercising fiduciary powers. Their startling growth has all occurred since that date.

In 1900 thirteen trust companies located in Massachusetts and doing fiduciary business reported to the Commissioner of Banks thirteen millions of trust assets; only thirty years later, fifty-nine trust companies and seventy-six national banks in Massachusetts reported one billion, eighty-six million of such assets. Of this vast sum four trust companies and two national banks, all in Boston, held seven hundred and sixty million. As you well know, it was only in 1913 that the passage of the Federal Reserve Act made it possible for national banks to obtain authority to act in a fiduciary capacity.

This recent rapid increase in the number of banks and trust companies that have acquired trust departments has unavoidably focused attention upon their activities. Criticism has resulted, much of it unjustified, but I am sorry to believe in some specific instances, at least, with justification. Unfortunately, it has been directed not only at the trust departments but it has also been directed against the bank and the banking fraternity in general. It has been added to the popular clamor of the hour so well expressed by your own Mr. Griswold in the following words:

"We are passing through an era when it is fashionable to cast aspersions upon a class rather than upon offending individuals. There are no decent lobbyists, unless they are perchance connected with the government, there are no respectable public utilities, unless they are being fostered by the government, and there are no pure bankers except such as wish to see the banks governmentally controlled. Such an atmosphere, where mere membership in a group creates a presumption of guilt until one can prove his innocence, breeds a variety of muck-raking and mud-slinging individuals, who, in pamphlet, book, and press, make malicious attacks upon a business as an entirety rather than upon those few individuals who have been a disgrace to their vocation."

For my purpose I paraphrase the last clause to read: "They make malicious attacks upon a business

*Address delivered before the meeting of the Trust Division at the convention of the American Bankers' Association at New Orleans, La., Nov. 13, 1935.

as an entirety rather than upon one department of the business or upon those individuals who from negligence or design have, whether as officers, directors or employees, conducted themselves unethically and in some cases illegally."

Before discussing the conduct of those individuals in detail I should like for convenience to divide banks into four groups or classes. In making this division and in what is said about unethical or illegal practices, it should be distinctly understood that the references are to only a few of the thousands of banks that are scattered from one end of this great country of ours to the other. I am not unmindful of the high, the very high, standards shown by the banks everywhere in those trying times before and immediately after the bank holidays when many a bank, although under the greatest strain itself, went quickly and effectively to the aid of a competitor. Many times that competitor had been a serious rival, but the aid was given and given generously. It would be hard to find in any other business or profession a finer exhibition or higher ethics than were shown by the bank in those troublesome days.

With this premise we will divide the banks.

Into the first group are placed those banks that have completely organized trust departments manned by men and women thoroughly trained: *bookkeepers* familiar with the keeping of trust records; *statisticians* accustomed to read corporate reports and knowing where and how to obtain and keep additional and trustworthy figures of those same corporations, constantly checking and rechecking not only the companies whose securities are at the time held in any of the trusts but also seeking out new investment possibilities; *experts who know real estate*, its value, the changing tendencies of its use, whether or not the localities in which mortgages are then held or may thereafter be available for investment are developing, retrograding or stagnant; *trust officers and their assistants* qualified to meet beneficiaries or those seeking advice with regard to the future establishment of trusts in any of their various forms, and answer all kinds of questions put to them; a *departmental committee* from among the trust officers who meet at regular and frequent intervals not only to review each trust but to consider such questions as change of investment, the advisability of continuing to hold a present investment or changing into a new one and also all questions of policy due to special conditions arising in any of the trusts,—over all these a *trust committee* appointed from the membership of the board of directors, to whom is referred for final decision the various questions above suggested, as well as the human problems involved in each estate or trust and who make frequent and periodic review of all accounts held by the department.

Banks in this great group not only have these various officers, directors and employees co-ordinated into a smoothly working team but they have the facilities to go forward with any needed improvement or enlargement of their services.

Speaking generally, and I speak from some considerable personal experience, the banks that would fall into this group in my city have throughout the years kept the faith and, considering their very rapid growth during the last twenty-five years, relatively few complaints have been registered against them.

Into the second group is placed the bank in a small community, so small that at least for years to come there can be no reasonable possibility of business enough to pay the expenses of a separate and distinct trust department. Banks in this group have no ethical right to attempt the establishment of a trust department, much less to give their customers advice along these lines.

Into the third group is placed the small bank in a growing community where the bank has a reasonable probability that in the near future it will be justified in opening such a department.

Into the fourth group, like the second and third, a small group, are placed the large and the small banks that have only a so-called trust department. They are muddling along. It is to the trust departments in the banks in this group that I wish particularly to address myself this afternoon, but it will be recognized that some of the criticisms I offer apply to an individual bank here or there in each of the other groups. I appreciate that general statements are always subject to exception and modification and that some of my generalizations are subject to very real exceptions and may be the subject of discussion after this paper is finished; nevertheless, I propose to present them in the main in general form.

No bank in this last group had any ethical right to establish a trust department, much less carry it on, until it had among its directorate one or more persons intimately familiar with the investment and reinvestment of funds in securities and real estate, sufficiently interested to give whatever time may be necessary to oversee the establishment of a proper trust department, and willing to follow, with the help of that department, the investments of the various trusts, checking at regular and frequent intervals each trust and the securities and mortgages therein.

No bank in this group had any ethical rights to establish such a department without having at hand proper and adequate sources from which accurate information could easily and quickly be obtained with regard not only to securities in the trust portfolios but also with regard to other securities about which its trust officers might be asked by those proposing to establish trusts with that bank.

Perhaps it had no adequate trust officer. Adequate in the sense that he had sufficient familiarity with the law governing the investment of trust funds and was competent to meet and answer quickly and correctly many of the questions put to him by the beneficiaries and others seeking information about the many kinds of trust services known to the banking world.

Perhaps it had no adequate books setting forth each trust and the investments therein, as well as the character of the trust and the specific terms and conditions under which it was held. For you realize better than I that under the trust department of every well organized bank, to name the more usual, come not only such fiduciary services as executor, administrator, guardian, conservator, and trustee under a will but also as trustee under voluntary trusts; as trustee for the collection of the proceeds of insurance policies; as agent under a full power of attorney to handle securities involving investment, safekeeping, collection and remittance of income; as agent in the management of real estate; as escrow agents; as agents for the executor or trustee; as the custodian of wills.

If then the institution in this fourth group is muddling along without all these facilities and more, too, you will agree that it is being conducted in an unethical manner. It will sooner or later bring down just criticism upon its own head and in all probability

some more muckraking on the banking fraternity as a whole.

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From these quotations it will be seen that an exact definition cannot be drawn of what is the practice of the law that can be rigidly applied to all cases. There is a hazy line of demarcation that separates the practice of the law from other activities that are legitimate business functions to be exercised by a bank through its trust officers. That the banks as well as the bar recognize the existence of this twilight zone is evidenced by the large number of so-called Codes of Rules for the Conduct of Trust Business that have been written within the last two or three years.

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As to Probate matters, the code states that it is "not believed possible to lay down a hard and fast classification, but it is believed that the probate of a will, appointment of an administrator, trustee, conservator, guardian or other fiduciary, the allowance of contested accounts, the bringing of petitions for instructions, and the conduct of litigation all constitute the practice of the law, and require under ordinary circumstances the employment of a lawyer." He must be outside the bank's own personnel, preferably the one who drew the will or trust instrument. Among other things the code provides for a Conference Committee

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as an entirety rather than upon one department of the business or upon those individuals who from negligence or design have, whether as officers, directors or employees, conducted themselves unethically and in some cases illegally."

Before discussing the conduct of those individuals in detail I should like for convenience to divide banks into four groups or classes. In making this division and in what is said about unethical or illegal practices, it should be distinctly understood that the references are to only a few of the thousands of banks that are scattered from one end of this great country of ours to the other. I am not unmindful of the high, the very high, standards shown by the banks everywhere in those trying times before and immediately after the bank holidays when many a bank, although under the greatest strain itself, went quickly and effectively to the aid of a competitor. Many times that competitor had been a serious rival, but the aid was given and given generously. It would be hard to find in any other business or profession a finer exhibition or higher ethics than were shown by the bank in those troublesome days.

With this premise we will divide the banks.

Into the first group are placed those banks that have completely organized trust departments manned by men and women thoroughly trained: *bookkeepers* familiar with the keeping of trust records; *statisticians* accustomed to read corporate reports and knowing where and how to obtain and keep additional and trustworthy figures of those same corporations, constantly checking and rechecking not only the companies whose securities are at the time held in any of the trusts but also seeking out new investment possibilities; *experts who know real estate*, its value, the changing tendencies of its use, whether or not the localities in which mortgages are then held or may thereafter be available for investment are developing, retrograding or stagnant; *trust officers and their assistants* qualified to meet beneficiaries or those seeking advice with regard to the future establishment of trusts in any of their various forms, and answer all kinds of questions put to them; a *departmental committee* from among the trust officers who meet at regular and frequent intervals not only to review each trust but to consider such questions as change of investment, the advisability of continuing to hold a present investment or changing into a new one and also all questions of policy due to special conditions arising in any of the trusts,—over all these a *trust committee* appointed from the membership of the board of directors, to whom is referred for final decision the various questions above suggested, as well as the human problems involved in each estate or trust and who make frequent and periodic review of all accounts held by the department.

Banks in this great group not only have these various officers, directors and employees co-ordinated into a smoothly working team but they have the facilities to go forward with any needed improvement or enlargement of their services.

Speaking generally, and I speak from some considerable personal experience, the banks that would fall into this group in my city have throughout the years kept the faith and, considering their very rapid growth during the last twenty-five years, relatively few complaints have been registered against them.

Into the second group is placed the bank in a small community, so small that at least for years to come there can be no reasonable possibility of business enough to pay the expenses of a separate and distinct trust department. Banks in this group have no ethical right to attempt the establishment of a trust department, much less to give their customers advice along these lines.

Into the third group is placed the small bank in a growing community where the bank has a reasonable probability that in the near future it will be justified in opening such a department.

Into the fourth group, like the second and third, a small group, are placed the large and the small banks that have only a so-called trust department. They are muddling along. It is to the trust departments in the banks in this group that I wish particularly to address myself this afternoon, but it will be recognized that some of the criticisms I offer apply to an individual bank here or there in each of the other groups. I appreciate that general statements are always subject to exception and modification and that some of my generalizations are subject to very real exceptions and may be the subject of discussion after this paper is finished; nevertheless, I propose to present them in the main in general form.

No bank in this last group had any ethical right to establish a trust department, much less carry it on, until it had among its directorate one or more persons intimately familiar with the investment and reinvestment of funds in securities and real estate, sufficiently interested to give whatever time may be necessary to oversee the establishment of a proper trust department, and willing to follow, with the help of that department, the investments of the various trusts, checking at regular and frequent intervals each trust and the securities and mortgages therein.

No bank in this group had any ethical rights to establish such a department without having at hand proper and adequate sources from which accurate information could easily and quickly be obtained with regard not only to securities in the trust portfolios but also with regard to other securities about which its trust officers might be asked by those proposing to establish trusts with that bank.

Perhaps it had no adequate trust officer. Adequate in the sense that he had sufficient familiarity with the law governing the investment of trust funds and was competent to meet and answer quickly and correctly many of the questions put to him by the beneficiaries and others seeking information about the many kinds of trust services known to the banking world.

Perhaps it had no adequate books setting forth each trust and the investments therein, as well as the character of the trust and the specific terms and conditions under which it was held. For you realize better than I that under the trust department of every well organized bank, to name the more usual, come not only such fiduciary services as executor, administrator, guardian, conservator, and trustee under a will but also as trustee under voluntary trusts; as trustee for the collection of the proceeds of insurance policies; as agent under a full power of attorney to handle securities involving investment, safekeeping, collection and remittance of income; as agent in the management of real estate; as escrow agents; as agents for the executor or trustee; as the custodian of wills.

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of six, three representing the banks and three representing the bar. Although appointed exactly three years ago it has been necessary to call the committee together only once and then to give me, as chairman, some advice on the form of answer to give to a question submitted by a trust officer. Only three complaints have been made to the committee and those for faulty advertising, which the offending banks corrected after informal notice from the chairman. . . .

In the Boston Code, just referred to, the banks are not forbidden to draw revocable trust instruments. It is my personal opinion that it is just as much the practice of the law to draw an instrument creating a living trust as to draw a will. Among others who hold this same view is Circuit Judge Allan Campbell of Michigan, who expresses his opinion in a recently decided case in these words: "They (the trust companies) distinguish living trusts from wills in that they are immediate parties to such trust agreements and only remote parties to the latter. The practical difference does not appear in the Court's mind. In both cases the trust company solicits business essentially legal in character and induces the public to avail itself of their legal department for this service. The service is not (as claimed) merely ancillary to the business, but is so inherently a part thereof that when they solicit by advertising or personal interviews the privilege of acting as trustee and offer to draw the instrument, they are seeking to sell the services of their paid legal staff." (This case was, I understand, argued on appeal before the highest court of the state in October.)

This is not the time nor the place to discuss the position of either the paid legal staff or the attorney who accepts business sent to him by the bank. This is treated in the Canons of Professional Ethics adopted by the American Bar Association. Canon 27 provides: "It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer." Canon 35 provides, "The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. . . He (a lawyer) should avoid all relations which direct the performance of his duties in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client."

It may however be helpful to consider some of the decided cases that have dealt with this subject. In 1930 disbarment procedings were brought against an attorney who was vice-president of a bank at a salary of $4,000 per year. He foreclosed mortgages, some for the bank and some for third parties. He appeared in probate proceedings. All attorney's fees allowed him by the courts or received in other ways were turned over to the bank. In deciding that he was guilty of misconduct in assisting the bank to practice law the Supreme Court of Minnesota said:

"There can be no objection to the hiring of an attorney on an annual salary basis by banks, other corporations, firms or individuals, to attend to and conduct its or their legal business. An attorney so employed may, as attorney for his employer, foreclose mortgages owned by such employer and may include the proper attorney's fees therefor in the foreclosure charges, so long as such fees are covered by and paid to him out of his salary and do not exceed what is actually paid to him or result in any profit to the employer. . . . But neither a corporation nor a layman not admitted to practice can practice law nor indirectly practice law by hiring a licensed attorney to practice law for others for the benefit or profit of such hirer. For this bank to employ defendant to conduct law business generally for others for the benefit and profit of the bank amounted to the unlawful practice of law by the bank and was misconduct both on the part of the bank and this defendant, who was a participant therein."[5]

In 1917 a trust company in New York advertised that it would furnish without obligation advice in regard to the making of wills. In response to a request made to the bank by someone who had read the advertisement a trust officer called up an attorney connected with the defendant's regularly retained firm of attorneys, who came to the bank, took the instructions from the customer, drafted the will, in which the trust company was named as executor, and attended to its execution the next day. No charge was made for services or advice in drafting and execution of the will.

On appeal it was held that the Trust Company was guilty of practicing law. In that case the court said:

"Its advertisement offered to furnish legal advice . . . Actually it furnished an attorney . . . to render these services. The attorney rendered these services because of his employment by defendant . . . Whether the work was included in the general retainer, whether he could refuse to perform unless he was paid by the party making the will, or whether he was paid at all is unimportant. . . . (Because of such employment) some attorneys would tend to regard primarily the interests of the corporation, and secondarily only, that of the client. . . . In the instant case the vice . . . is divided allegiance."[6]

It is this failure carefully to observe the balance of interest between the bank on the one hand and its customer on the other that has brought down criticism and even injunctions upon banks muddling through in our fourth group. A proper standard for them might well be the trust officer as he is described by the Federal Reserve Bank of Minneapolis:

"He must be designated and appointed by the board of directors and his duties prescribed. He must be adequately bonded. Neither he nor any officer or employee should perform legal services for customers or the public in general or hold himself out as able and willing to extend such services; nor should he hold himself out as an expert tax advisor. No officer should handle fiduciary accounts as an individual if his institution has power and authority to administer them.

"A trust officer must of necessity have a reasonable working knowledge of trust accounting, law, taxation, investments, real estate, statistics, and salesmanship, or have at his command persons who do possess such knowledge; he must be honest and tactful, prudent and personable. His duty to make a reasonable profit for his institution will tend to conflict with his duty to administer efficiently the trust in his care. In case of a conflict or supposed conflict between the interests of the institution and the interests of those for whom it acts as fiduciary, the interests of the former must give way. The trust officer is primarily the representative of the trustor and the beneficiaries, and he will be so regarded."

Given such a trust officer and the business so conducted that just criticism oft repeated cannot be leveled against the department, the chances are good that the bank itself is entirely ethical and belongs in our first group.

5. *In re Otterness*, 181 Minn. 254.
6. *People v. People's Trust Company*, 180 App. Div. 494.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

CRIMINAL EVIDENCE. By H. C. Underhill. Fourth Edition, by John Lewis Niblack. Indianapolis: The Bobbs-Merrill Company. 1935. Pp. xxviii, 1691.—In the preface to the first and second editions of this work Mr. Underhill asserted: "The general rules of proof constituting the body of the law of evidence are so well settled as to obviate their discussion in detail in this work. The main difficulty in judicial proceedings is to determine when and to what extent general principles are applicable to the facts and circumstances of particular cases."[1] He also endeavored to make his citations exhaustive and recent. The third edition, prepared by Mr. Samuel Grant Gifford, was in 1923 offered as "a comprehensive treatment of the law of criminal evidence as it has been declared by the courts of last resort."[2] It purported, in addition, "to indicate any tendency to modify, supplant or confirm former rules of evidence or to create new ones."[3] The present volume has retained the original framework by Mr. Underhill, "and the only changes that have been made are such as have become necessary by the growth of the body of the law itself."[4] It is, therefore, a bit difficult to determine by what standard the authors and publishers desire to have the book judged. Mr. Underhill apparently was content to present it as a well organized guide to the cases. His successors seem somewhat more ambitious.

It would be a delight to be able to report the appearance in one volume of a real study of the vexed problems in evidence and a good guidebook to the decisions; but this delight must be foregone. There is scarcely an attempt at a searching analysis or a serious examination of the merits of a single rule. Frequently there is a failure to disclose even an appreciation that the courts are in confiict, to say nothing of trying to ascertain the basis of the disagreement or to weigh the considerations, historical, logical or pragmatic, leading to the divergent doctrines. For example, in section 304 it is said that the prosecution has the burden of proving "all the necessary ingredients of a crime, including the criminal intention, and this rule logically casts the burden of proving the sanity of an accused person upon the prosecution in the first instance." There is a warning that a distinction must be made between burden of proof on the one hand and mode and order of proof, on the other, after which it is pointed out that the fact that defendant must prove his insanity puts on him only the burden of going forward with the evidence. This is followed immediately by a reminder that the presumption of innocence persists throughout the trial, and then: "What may be called the burden of evidence shifts to the defendant at times, as when he offers proof of insanity as a material matter in defense, and he must prove it by preponderance of evidence." For every assertion some cases are cited.[5] From this text can any intelligible idea be obtained; would anyone realize that there are at least five different rules applied by the various courts? Really troublesome questions are sometimes ignored. To what extent, if at all, may a jury properly give to its rejection of the accused's testimony the effect of substantive affirmative evidence against him? What use, if any, may the prosecution, under the Federal rule, make of evidence obtained as the result of following clues discovered in the course of an unlawful search and seizure? If any light is shed upon these in the text, a search of the index failed to disclose it.[6] Some of the newer types of evidence and devices for discovering it are treated. The lie detector, the movietone, the comparison microscope and expert ballistic evidence are briefly discussed. There is, however, no mention of the Landsteiner blood tests[7] in bastardy cases and allied litigation. The chapter on finger-prints, written for the 1923 edition, has been supplemented by some of the cases since decided, but has not in some respects been brought up to date. It leaves the impression that finger-prints cannot be planted or forged. The conclusion, then, must be that one seeking a scholarly treatment of evidential problems, old or new, must look elsewhere.

What of its value as a casefinder? A few tests show it to be far from trustworthy. In section 42 it is said that the presumption of innocence accompanies the accused until a verdict is rendered, and in section 51 that the jury must take this presumption into consideration. There is no awareness of the conflict that has waged around *Coffin v. United States,* 156 U. S. 432, and *Agnew v. United States,* 165 U. S. 36, although in section 42 there is mention of the fact that "It has been held that the presumption of innocence does not necessarily remain throughout the trial. . . ." In support of

1. P. iv, First Edition; p. iv, Second Edition The first edition was published in 1898, the second in 1910. It will be remembered Wigmore's classic was published in 1903 and had been preceded by the 16th edition of Greenleaf in 1899. Whatever excuse there may have been in 1898 for considering the general rules of evidence settled, except in the most vague sense of the term, was destroyed by Wigmore's masterpiece.
2. P. iii, Third Edition.
3. P. iii, Third Edition.
4. P. iii, Fourth Edition.
5. In section 575 it is noted that an instruction placing upon the defendant the burden of proving insanity has been upheld in twelve states. In support there are citations of decisions from these states; and among the states are eight from which in section 304 are cited cases in support of the proposition first quoted above from that section.
6. The former is almost touched in section 258: "It has been held that a false theory of defense is some evidence of guilt." For this is cited an early Pennsylvania case, which is in point, and an Arkansas case which has nothing at all to do with the question. In section 587 the effect of attempting to prove a false alibi is unsatisfactorily treated. In neither section is there any indication of an appreciation of the problem which has been troubling the courts.
7. See 12 A. B. A. L. J. 441 (1926).

the proposition that the presumption against suicide gives way to the presumption of innocence "where facts shown point to decedent's self-destruction or to murder by defendant," *People v. Creasy*, 236 N. Y. 205, is cited with no reference to its later express repudiation in *People v. Miller*, 257 N. Y. 54, 61. In section 53 it is definitely indicated that there is no constitutional objection to statutes fixing upon defendant the burden of proving certain propositions that the state would normally have to prove; but *Morrison v. California*, 291 U. S. 82, is not mentioned, nor is there any reference to *State v. Lapointe*, 81 N. H. 227, although the latter is cited in section 51 upon another point. In the discussion of the privilege against self-incrimination one looks in vain for *United States v. Murdock*, 284 U. S. 141. In section 569 there is a flat statement that a declaration by a third person of his guilt of the offense for which defendant is on trial is inadmissible. The citations to support this are inadequate and give no intimation of the growing dissent found in such cases as *Hines v. Commonwealth*, 136 Va. 728, *Brennan v. State*, 151 Md. 265, and the opinion in *State v. English*, 201 N. C. 295. It is impossible without undue labor to tell whether the authors have anywhere treated these cases, for no table of cases is furnished.

It would be useless to pursue the matter further. The text cannot be relied upon as either accurate or complete; the citations are neither discriminating nor exhaustive. No doubt the accuracies exceed the inaccuracies, but the reader cannot without investigation tell which are which. In a word, the book serves no purpose which would not be served by the collection in one volume of selected headnotes upon specific topics relating to criminal evidence.

Harvard Law School E. M. MORGAN

Pareto's General Sociology: A Physiologist's Interpretation, by Lawrence J. Henderson. Harvard University Press. 1935. 119 pp.—Professor Lawrence J. Henderson is one of the most distinguished physiologists of the time. His works seem destined to create a theoretical physiology on the model of the physics and chemistry of W. Gibb. He has in addition published important philosophical studies.

It was thus a special piece of good fortune for the *Sociologie Générale* by Pareto, now translated into English, to find so good a commentator. For many years Professor Henderson has given at Harvard University a series of lectures with discussions of that authoritative work, there expounded by a savant of the first rank in a rigorously scientific spirit. Those who, like the author of the present review, have had the good fortune to be present at the exposition given by Professor Henderson, cannot but rejoice to see now made accessible to the public a large part of the teaching of the great savant.

One will find in this book, small in form but rich in content, all that makes the charm of the oral teaching of Professor Henderson—the clearness of explanation, the personal working over of the thoughts of the Master of Celigny, with the addition of numerous new examples borrowed either from history or the social sciences, or sometimes from natural sciences and the works of scientific philosophy, together with a very clear diagram to make accessible to all the idea of their mutual dependence. Finally, in many of the pages, an irony less biting than that of Pareto himself, but still quite touched with his spirit.

Professor Henderson has succeeded in giving the essential idea of Pareto's sociological system—the construction of a general and abstract scheme of human society, on mechanical or physico-chemical models, seeking to discover the essential forces which determine form by their equilibrium. The author has perfectly succeeded in his endeavor. Numerous notes complete his exposition.

In a word, this book of Professor Henderson makes an ideal introduction to the study of Pareto's sociology. In recommending heartily the reading of the book, one hopes that the learned Harvard professor will continue to give us further essays on the same topic.

University of Algiers G-H BOUSQUET

The Canadian Unemployment Insurance Act: Its Relation to Social Security. By J. L. Cohen. 1935. 167 pp. Toronto: Thomas Nelson & Sons, Ltd.—Unemployment insurance, with its many legal problems and its wide social and economic implications, is a subject which is now very much in the minds of most lawyers, and in consequence any writer on the subject with a claim to authority is certain to find a large group of readers in the legal profession. Cohen's book, though it deals with the Canadian Unemployment Insurance Act, is not likely to be an exception, because the basic theory of that Act, which was derived from the British Act, has been accepted generally in this country.

This volume does not contain a copy of the Canadian Act. It is rather a criticism of the Act in its social and economic aspects from the viewpoint of one who apparently is an uncompromising Marxist. After a brief summary of the contributory and benefit provisions of the Act, the author proceeds to point out the limitations inherent in any attempt to deal with the problem of unemployment on any insurance basis. This, of course, is not new. Early in 1931 when interest in unemployment insurance first became general in this country, these limitations were authoritatively pointed out. That unemployment insurance as known in Canada and in this country is not a complete answer to the whole problem of unemployment is now generally conceded.

Cohen's thesis is that permanent unemployment is an inevitable consequence of our present profit motivated capitalistic system. Convinced of this, it is only logical that he should object to the basic property concept involved in any scheme which requires employee contributions—this property concept being expressed in the view that the benefits an unemployed person receives are a property right bought and paid for by his money contributions while employed. Cohen argues that the only proper basis for any system of unemployment payments is a recognition of all unemployment as a direct charge upon the economic system which has produced it. From this he proceeds to the conclusion that the state, as an incident of its right to maintain the system which has caused the unemployment, should bear the full cost of compensating all unemployed persons by taxing existing wealth. Such a tax would fall, he insists, on wealth which the unemployed helped to produce by working when there was work for them to do, and hence the burden would be shared by all. All of this involves a multitude of basic assumptions of a highly controversial nature, the validity of which cannot be examined here. It is perhaps enough to point out that in this country there has been no disposition to pay unemployment benefits outside of unemployment insurance plans on any basis other than individual need of assistance. Unless there is a radical change in sentiment, there is no likelihood

of Cohen's views being translated into law in this country.

No matter what one's convictions may be, no serious student of the problem of unemployment and the attempts at its solution should be unfamiliar with the aims and policies of the group for which this book speaks, and nowhere are their aims and arguments more concisely put, for the author writes pointedly and, despite some repetition, with a welcome brevity.

While Cohen feels that the system which he advocates can be worked out and administered in our present capitalistic economy, this view will assuredly find no wide support here. In this country the prevailing view of those who are striving to solve the problems of unemployment, is to work out methods not only within the framework of the existing legal order, but also within the scope of our traditional social and economic beliefs.

New York City. JOSEPH HOWLAND COLLINS.

Leading Articles in Current Legal Periodicals

Illinois Law Review December (Chicago)—One Form of Civil Action, but What Procedure, for the Federal Courts, by O. L. McCaskill; Judicial Selection—Current Plans and Trends, by Charles T. McCormick; The Judges of the Nisi Prius Courts of Illinois, by Howard Neitzert.

Minnesota Law Review, December (Minneapolis, Minn.)—The New Minnesota Probate Code, by William L. Eagleton; Workmen's Compensation and the Conflict of Laws—The Restatement and Other Recent Developments, by Ralph H. Dwan.

University of Pennsylvania Law Review, December (Philadelphia, Pa.)—Constitutional Aspects of Federal Housing, by Edward S. Corwin; The Duties of a Trustee with Respect to Defaulted Mortgage Investments, by Parker Bailey and Charles Keating Rice; The English System of Real Property Taxation, by Frank B. Murdoch, Jr.; The Private Bond Case as a Postponement of the Real Issue, by J. Roland Pennock.

Iowa Law Review, November (Iowa City, Ia.)—The Conversion of the Use Into a Legal Interest, by Percy Bordwell; The Divisibility of Employment Contracts, by Carl E. McGowan; Constitutional Provisions Regulating the Mechanics of Enactment in Iowa, by Laurence M. Jones.

Michigan Law Review, November (Ann Arbor, Mich.)—Estoppel and Statutes of Limitation, by John P. Dawson; The Unicameral Legislature in Nebraska, by Lester B. Orfield; Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act, by Paul G. Kauper.

Yale Law Journal, November (New Haven, Conn.)—Drawing Against Uncollected Checks; I, by Underhill Moore, Gilbert Sussman, Emma Corstvet; Commercial Arbitration—Enforcement of Foreign Awards, by Ernest G. Lorenzen; Non-Consensual Suretyship, by Morton C. Campbell.

Journal of Criminal Law and Criminology, Including the American Journal of Police Science, November (Chicago, Ill.)—Concerning Parole in Illinois, by Henry Barrett Chamberlain; The German Prevention of Crime Act 1933, by Hermann Mannheim; Survey of Juvenile Probation, by George E. Lodgen and Benedict S. Alper; Reliability of Psychological Prognosis, by A. C. Carter and G. I. Giardini; A Criminal Liability, by Walter Webster Argow; Physical Capacity of the Criminal, by Benjamin Frank and Paul S. Cleland; Proof of Finger-Prints, by Albert S. Osborn; The Plastic Surgeon and Crime, by Jacques W. Maliniak; Powder Patterns and the Fallibility of Eye-Witnesses, by Charles M. Wilson.

Kentucky Law Journal, November (Lexington, Ky.)—Testamentary Revocation by Divorce, by Alvin E. Evans; The American Constitutional System—An Experiment in Limited Government, by Forrest Revere Black; A Study of the Report of the Committee on Criminal Law, by Roy Moreland and Robert E. Hatton, Jr. Some Changing Patterns in the Legal Order, by F. R. Aumann.

Temple Law Quarterly, November (Philadelphia, Pa.)—The Pennsylvania Personal Property Tax, by Leighton P. Stradley; Extradition of Nationals, by Martin T. Manton; Can the Legislature Alone Call a Constitutional Convention, by Clarence G. Shenton; The Effect of a Gift of Intermediate Income Upon the Vesting of Legacies, by Edward J. Fruchtman; Liability of Those Who Sign Negotiable Instruments in a Representative Capacity, by Walter Burgwyn Jones.

New York University Law Quarterly Review, November (New York City)—The Restatement of the Law of Torts, by Percy H. Winfield; Unemployment Insurance in the State of New York, by Herman Arnold Gray; The Doctrine of Quasi-Territoriality of Vessels and the Admiralty Jurisdiction Over Crimes Committed on Board National Vessels in Foreign Ports, by Alexander N. Sack; Recent Neutrality Legislation, by Clyde Eagleton; Preference Among Creditors Made by a Foreign Corporation, by Nathan Siegel.

St. John's Law Review, December (Brooklyn, N. Y.)—Civil Judicial Statistics in New York, by Leonard S. Saxe; A Strange Instance of Procedural Self-Denial, by Jay Leo Rothschild; Some Aspects of the Taxation of Federal and State Instrumentalities, by Benjamin Harrow.

Harvard Law Review, December (Cambridge, Mass.)—Commerce, Pensions, and Codes II, by Thomas Reed Powell; Marine Insurance Certificates, by Philip W. Thayer; Federal Income Tax: Capital Gains and Losses, by Homer Hendricks.

Virginia Law Review, December (University, Va.)—Patent Pools and Cross Licenses, by H. H. Toulmin, Jr.; Jurisdiction over the Beneficiary Corporation in Stockholders' Suits, by Norman Winer; On a Ministry of Justice, by Henry Selden Bacon.

University of Chicago Law Review December (Chicago)—The Protection of Laborers and Materialmen under Construction Bonds—Part I, by Morton C. Campbell; The Effect of the Trust Receipts Act, by George Gleason Bogert; Delay in Acting on an Application for Insurance, by William L. Prosser; Recent Federal and Local Legislation, by Members of Chicago Law School Faculty under direction of Kenneth C. Sears.

Tulane Law Review, December (New Orleans, La.)—Legal Education in Modern Society, by Charles E. Clark; Criminal Jurisdiction over Foreign Merchant Ships, by James J. Lenoir; Critical Remarks on the Law of Bills of Exchange of the Geneva Convention, by Elèmer Balogh; The Judicial Status of Non-Registered Foreign Corporations in Nicaragua, by Phanor J. Eder; Public Liability Insurance: The Injured Person's Right to Recovery When the Policy Holder Fails to Give Immediate Notice to the Insurer, by William J. McClendon, Jr.; Government-Controlled Business Corporations: A Symposium, by Stanley Reed, Thomas W. Palmer and Louis B. Wehle.

University of Cincinnati Law Review, November (Cincinnati, Ohio)—Report of the Cincinnati Conference on Criminal Law Administration.

United States Law Review, November (New York City)—The Criminal Code of China, by George Sylvester; The Proof of Foreign Law in American Courts, by Samuel R. Wachtell.

Rocky Mountain Law Review, December (Boulder, Col.)—Priority Between Equitable Interests by Frederic Putnam Storke: Is Federal Centralization the Only Practicable Alternative, by Henry W. Toll; The Remedy of Specific Performance in Colorado Contracts, by Terrell C. Drinkwater.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
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THE AMERICAN LAW INSTITUTE CONSIDERS THE "OUGHT-TO-BE"

Those who have attended meetings of the American Law Institute will recall many instances in which the Reporter, defending his restatement of a certain principle, called the attention of a protesting member to the fact that they were restating the law as it is and not as it ought to be.

This was of course entirely true. But in spite of that, this "ought-to-be" kept thrusting itself into the minds of various members every now and then, and finding at least a brief expression. It was recognized by the Reporters themselves at times, even while defending a necessary adherence to the task of restatement of the common law as it is. It was a difficulty which could be settled very easily on logical grounds, but which, possibly for the reason that logic is not everything either in law or life, still remained unsettled.

Finally a happy solution was hit upon —one which kept the Restatements within the bounds originally set but also, by way of supplement, provided for due attention to the irrepressible "ought-to-be." It was contained in the "Report on the Future of the Institute," made by the Executive Committee to the Council and submitted to the Institute itself for consideration at the last annual meeting. It was, in brief, that the Institute "utilize the knowledge and experience of the Reporters and Advisers in our Restatement work in drafting acts for the correction of defects in the existing common law." In other words, that the common law as restated be supplemented by statutory proposals embodying the correction of defects which those working on particular subjects had come upon in the course of their labors. The rest would of course lie with the legislatures.

That the Reporters were not so enamored of the existing law as to be oblivious of its occasional deficiencies was of course well understood by those who knew the men and their work. If further evidence had been needed, it would have been promptly furnished by the response of the Reporters and their Advisers to the Committee's request for suggestions of needed legislative action in their respective fields. Some of these suggestions are set forth by way of example in the Committee's report, and they leave no doubt that the common law as restated needs legislative supplement in various respects and also that the Institute has, as a result of the work of a corps of experts in the various fields, the most accurate and authoritative basis obtainable for drafting the needed statutes.

It thus appears quite plain that the drafting of statutes as suggested by the Committee is a natural and logical development of the Institute's work of Restatement —and one for which it is particularly fitted. However, at the outset of an undertaking of that kind, the Institute was confronted by the fact that another important body—the Conference of Commissioners on Uniform State Laws—is also engaged in the statutory drafting field, and there was therefore the possibility of either conflict in the statutory proposals or duplication of work. This difficulty, however, has recently been settled at a meeting between representatives of the two organizations, at which an agreement was reached for a conference from time to time with regard to the acts which the respective organizations contemplate drafting and for cooperation in respect to those acts which they may advantageously prepare together. Incidentally, at that meeting it was decided that they should cooperate in drafting an Act on the substantive law of Aeronautical Flight and an Estates Act.

The American Law Institute has of course already done some work in the field of proposed legislation. The Code of Criminal Procedure is the most outstanding example. At the last annual meeting the draft of an Act on Double Jeopardy was approved.

Interstate Crime Commission Makes Recommendations

AT the meeting in New York City on November 30, December 1 and 2, the Interstate Commission on Crime, which grew out of the New Jersey Crime Conference last October, took decisive action in favor of several proposals for interstate cooperation in control of crime. The suggested laws will be submitted to the state legislatures in 1936 by the Council of State Governments, whose function it is to afford an opportunity for the states to bring their legislative policies more closely together.

The general meeting of the Commission took favorable action on the following proposals:

1. The act prepared by the Commissioners on Uniform State Laws which permits officers "in close pursuit of a person" to arrest him in another state. The officer may then take the accused before a judge of the state of apprehension. If the judge declares the arrest lawful, the person may be returned to the state in which the crime was committed.

2. The Uniform Act on Interstate Extradition was approved by the Conference with some additions to be used in special cases. The act sets up complete procedure for extradition of criminals from one state to another including a hearing by the examiner of the state of extradition.

3. The Indiana-Illinois draft of an act for supervision of out-of-state parolees and probationers was endorsed.

4. The Uniform Act on removal of witnesses from one state to another—not more than 1000 miles distant—was also approved.

The Commission also made two important recommendations on which specific legislation was not suggested. These were:

1. Establishment of bureaus of criminal identification in every state.

2. Fingerprinting of all people who obtain motor vehicle registration certificates and drivers' licenses.

The background and purposes of the Interstate Commission were sketched by George C. S. Benson, managing editor of "State Government" when he spoke before the Wisconsin State Bar Association at Milwaukee on November 20. One of the most important problems, he points out, is that of interstate rendition of criminals, because state lines give the fleeing criminal an advantage that is not conducive to an efficient administration of justice. Mr. Benson goes on to say:

"Extradition is only one aspect of the interstate crime problem. The spectacular movements of the Dillinger gang and of the followers of William Karpis demonstrate that state boundaries are useful protection against apprehension as well as against appearance before a court. When a gang of criminals can drive their high-powered motor car across four state boundary lines in a single day, it is evident that interstate police action is necessary. Criminals naturally discover legal loopholes, and thus increase the importance of this means of escape. Before interstate compacts broke up the practice, they used boundary waters like the Hudson River and Lake Michigan to evade apprenhension. In this motor age, paved highways are proving even more helpful to the fugitive from justice.

"To encourage state efforts to meet this difficulty, Congress passed the Ashurst Sumners Act (H. R. 7353, 73rd Congress) on June 6, 1934. This act gives blanket consent to the states to establish 'interstate agreements and compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.'

"In the terms of that act lies the potentiality of a stiff 'shot in the arm' for law enforcement machinery in this country. Speedier and more effective action in control of crime can result from extensive use of this opportunity.

"The interstate compact has not been overworked in the crime field heretofore. Eight crime compacts—all dealing with jurisdiction over territorial waters—have been approved by Congress. Only four of them, however, have been put into force by state legislative action. Since the Congress rarely fails to approve an interstate compact, it can safely be said that the major difficulty in the path of crime compacts in the past has been the securing of state action and not the obtaining of congressional approval.

"This generalization has been again illustrated in the history of the state legislative enactments pursuant to the Ashurst Sumners Act. The *will* to united state action has been clear, but the *way* has been uncertain. With the exception of the Central States Parole Conference—which has done very able work, in a limited field—no agency for unification of state action had a crime compact to present to the forty-three regular sessions of 1935. At least eight states—Kansas, Colorado, Indiana, Michigan, Minnesota, New Mexico, Oregon, and South Dakota, enacted legislation bearing on crime compacts during 1935. But these enactments varied widely. A broad South Dakota statute would allow officers of other states full police powers in South Dakota, on a reciprocal basis. Several states authorized the governor or a special commissioner to enter into compacts without requiring subsequent ratification by the legislature. New Mexico appointed the Attorney General as a commissioner to negotiate compacts which must be ratified by the legislature. Indiana adopted a detailed compact for supervision of parolees, at the same time authorizing the governor to enter into compacts.

"While the procedural variations do not present insuperable obstacles to interstate crime compacts, the substantive difference in the various proposals meant that no real improvement of law enforcement machinery came from the 1935 sessions. Some interstate negotiating machinery was needed.

"That machinery has been provided by the Council of State Governments, of which Henry W. Toll is executive director, and by the Commissions and Committees on Interstate Cooperation created by more than a score of states in 1935. In October the New Jersey Commission, of which Judge Richard Hartshorne is chairman and Attorney General Wilentz a member, called a nation wide crime conference at Trenton. The conference was attended by more than 100 delegates from 30 odd states, including Governors, Attorneys General, legislators, and state police executives. It adopted certain general principles; created an Interstate Commission on Crime; and requested the Council of State Governments to act as secretariat.

"The Executive Committee of the Commission on Crime includes Judge Hartshorne as Chairman, Attorneys General Clarence V. Beck of Kansas, John J. Bennett, Jr. of New York, Joseph Chez of Utah, Otto Kerner of Illinois, and Hon. Justin Miller of Washington, D. C. and Hon. S. Pierre Robineau of the Florida Legislature.

REVIEW OF RECENT SUPREME COURT DECISIONS

Unconstitutional Encroachment on Reserved Powers of States in Section 5 (i) of Home Owners Loan Act—Federal Penalty Imposed as Sanction for Enforcement of State Law Held beyond Powers Delegated to United States—Liability of Promoters to Receiver of Corporation for Wrongful Diversion of Corporate Assets—Equitable Powers of Federal Courts over Suits Brought to Avoid Multiplicity of Suits Should not Be Exercised Where Advantage to Plaintiff Is Slight as Compared with Disadvantages Imposed on Defendants—Receipt of Notice Circulated Among Dealers That Certain Bonds of a Large Issue Had Been Stolen not Sufficient Notice of Defect in Title, under Circumstances Stated etc.

By Edgar Bronson Tolman*

Constitutional Law—Power of Federal Government to Transform State Building and Loan Associations into Federal Corporations

Subdivision (1) of Section 5, Home Owners Loan Act of 1933, as amended in April 1934, to the extent that it permits the conversion of State associations to Federal ones, in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the states, and offends against the Tenth Amendment.

Hopkins Federal Savings and Loan Ass'n. et al v. Cleary et al, 80 Adv. Op. 209; 56 Sup. Ct. Rep. 235.

In this opinion, by Mr. Justice Cardozo, the Court disposed of three cases arising under the Act of Congress designated as the Home Owners' Loan Act of 1933, as amended. Two of the cases arose on suits of two building and loan associations of Wisconsin to enjoin the State Banking Commissioner from interfering with their proceedings to convert themselves into federal corporations under the statute mentioned. The other case arose in a suit brought by the Banking Commission for the purpose of annulling proceedings whereby a state building and loan association had attempted to convert itself into a federal corporation under the federal law. This suit was brought under the original jurisdiction of the State Supreme Court.

That Court took the position that the federal act did not authorize the corporate change where it was not permitted by state law, and did not rule on the constitutional validity of the federal act. On certiorari, the Supreme Court affirmed the ruling, but on the ground that the federal act was unconstitutional.

The corporate proceedings and the provisions of the federal statute are described in the opinion. It will suffice here to state that the building and loan associations had, by vote of their shareholders, with relatively few dissenting stockholders, voted to convert themselves under Section 5 (i) of the Home Owners' Loan Act. That Section (as amended) provides as follows:

"(i) Any member of a Federal Home Loan Bank may convert itself into a Federal Savings and Loan Association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action; but such conversion shall be subject to such rules and regulations as the Board may prescribe, and thereafter the converted association shall be entitled to all the benefits of this section and shall be subject to examination and regulation to the same extent as other associations incorporated pursuant to this Act."

In review of the judgments, Mr. Justice Cardozo examined the provisions of the federal act to determine whether it was intended to operate only on condition that no conversion was to take place in contravention of local laws. This examination led to the conclusion that the right attempted to be conferred was not subject to any such condition. As to this, the learned Justice said:

"Congress did not mean that the conversion from state associations into federal ones should be conditioned upon the consent of the state or compliance with its laws."

* * *

"Courts have striven mightily at times to canalize construction along the path of safety. . . When a statute is reasonably susceptible of two interpretations, they have preferred the meaning that preserves to the meaning that destroys. . . 'But avoidance of a difficulty will not be pressed to the point of disingenuous evasion.' . . 'Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power.' . . The problem must be faced and answered."

The Court then addressed itself to the question of the constitutional validity of the statute. The conclusion reached on this point was stated thus:

"The Home Owners Loan Act, to the extent that it permits the conversion of state associations into federal ones in contravention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the states. United States Constitution, Amendment X."

In support of this conclusion, the Court observed that, if the act is to be upheld against inconsistent state laws, the power would not necessarily be subject to the requirements that 51% of the stockholders shall approve, nor limited to building and loan associations. It also alluded to questions which might be urged under the Fifth Amendment, by non-assenting stockholders or creditors.

As to the precise question presented, the Court expressed the view that it was unnecessary to consider whether Congress has power to create building and loan associations, but that "The critical question here is something very different. The critical question is whether along with such a power there goes the power also to put an end to corporations created by the states

*Assisted by James L. Homirè.

and turn them into different corporations created by the nation."

In dealing wtih this question, the following analysis was made of the status of quasi-public corporations of the states, and of the powers of the states and of the nation in relation thereto:

"A corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi-public, though for other purposes of classification the corporation is described as private. . . This is true of building and loan associations in Wisconsin and in other states. They have been given corporate capacity in the belief that their creation will advance the common weal. The state, which brings them into being, has an interest in preserving their existence, for only thus can they attain the ends of their creation. They are more than business corporations. They have been organized and nurtured as quasi-public instruments. . . They may not divest themselves of a franchise when once it is accepted if the local statutes or decisions command them to retain it. . . How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.

"Wisconsin, planning these agencies in furtherance of the common good and purposing to preserve them that the good may not be lost, is now informed by the Congress, speaking through a statute, that the purpose and the plan shall be thwarted and destroyed. By the law of the state, associations such as these may be dissolved in ways and for causes carefully defined, in which event the assets shall be converted into money and applied,, so far as adequate, to the payment of the creditors. By the challenged Act of Congress, the same associations are dissolved in other ways and for other causes, and from being creatures of the state become creatures of the nation. In this there is an invasion of the sovereignty or quasi-sovereignty of Wisconsin and an impairment of its public policy, which the state is privileged to redress as a suitor in the courts so long as the Tenth Amendment preserves a field of autonomy against federal encroachment.

"We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is diclosed) to exercise a power that is exclusive as well as paramount. . . That is not the situation here. No one would say with reference to the business conducted by these petitioners that Congress could prohibit the formation or continuance of such associations by the states, whatever may be its power to charter them itself. So also we are not concerned with the rule to be applied where the business of an association under charter from a state is conducted in such a way as to be a menace or obstruction to the legitimate activities of its federal competitors. . . For anything here shown, the two classes of associations, federal and state, may continue to dwell together in harmony and order. A concession of this possibility is indeed implicit in the statute, for conversion is not mandatory, but dependent upon the choice of a majority of the voters. The power of Congress in the premises, if there is any, being not exclusive, but at most concurrent, and the untrammeled coexistence of federal and state associations being a conceded possibility, we are constrained to the holding that there has been an illegitimate encroachment by the government of the nation upon a domain of activity set apart by the Constitution as the province of the states. . . The destruction of associations established by a state is not an exercise of power reasonably necessary for the maintenance by the central government of other associations created by itself in furtherance of kindred ends."

Following this was a discussion of the standing of the state to challenge the encroachment on its reserved power.

The opinion was concluded as follows:

Confining ourselves now to the precise and narrow question presented upon the records here before us, we hold that the conversion of petitioners from state into federal associations is of no effect when voted against the protest of Wisconsin. Beyond that we do not go. No question is here as to the scope of the war power or of the power of eminent domain or of the power to regulate transactions affecting interstate or foreign commerce. The effect of these, if they have any, upon the powers reserved by the Constitution to the states or to the people will be considered when the need arises.

The case was argued by Messrs. Emery J. Woodall and Horace Russell for the petitioners, and by Messrs. Benjamin Poss and Joseph P. Brazy for the respondents.

Constitutional Law—Powers Reserved to States—Exactions Imposed by United States on Person Violating State Law

Section 701 of the Revenue Act of 1926, imposing an exaction of $1,000 on every person engaged in certain forms of business relating to intoxicating liquors, where such business is carried on contrary to state law, is a penalty rather than a revenue measure. As a penalty, the exaction is imposed as a sanction for enforcement of state law, and is beyond the powers delegated to the United States under the Constitution.

United States v. Constantine, 80 Adv. Op. 195; 56 Sup. Ct. Rep. 223.

In this case the Court considered the construction and constitutional validity of Section 701 of the Revenue Act of 1926. That section imposes what is denominated therein as "a special excise tax of $1000" in the case of every person carrying on the business of a brewer, distiller, retail dealer in malt liquor, and other businesses of a related character, in any State, Territory or District of the United States wherein the specified business is prohibited by local law. The respondent was charged with carrying on the business of a retail malt liquor dealer in Alabama, contrary to its law, and without paying the $1000 federal excise tax. On stipulated facts it was disclosed that the respondent had paid the tax of $25 imposed by R. S. 3244, but had not paid the $1000 excise tax. Respondent's conviction in the District Court was reversed by the Circuit Court of Appeals, on the ground that Section 701 had become inoperative on repeal of the Eighteenth Amendment. On certiorari this was affirmed by the Supreme Court, with three Justices dissenting.

The Government contended that the Section was not a part of the machinery for enforcing the prohibition amendment, but was a revenue measure. In rejecting the contentions of the Government, MR. JUSTICE ROBERTS, who delivered the prevailing opinion, expressed the view that little aid was to be had from the legislative history of the Section and that the administrative practice had little bearing on the nature of the exaction.

Addressing attention to the nature of the exaction, the Court conceded that the United States is vested with power to levy excises on occupations, and needs only to look to the exercise of the occupation or calling taxed, regardless of whether such exercise is prohibited or permitted by the laws of the United States or of a state.

"The burden of the tax may be imposed alike on the just and the unjust. It would be strange if one carrying on a business the subject of an excise should be able to ex-

cuse himself from payment by the plea that in carrying on the business he was violating the law. The rule has always been otherwise. The tax imposed by R. S. 3244 affords an apposite illustration. That act imposes an excise, varying in amount, upon different forms of the liquor traffic. The respondent paid the annual tax of $25 thereby required, despite the fact that he was violating local law in prosecuting his business. Undoubtedly this was a true tax for which he was liable. The question is whether the exaction of $1,000 in addition, by reason solely of his violation of state law, is a tax or a penalty? If, as the court below thought, section 701 was part of the enforcing machinery under the Amendment, it automatically fell at the moment of repeal."

Leading to a discussion of the nature of the exaction, the Court emphasized the point that the only color for assertion of federal power to impose a penalty for the violation of state liquor laws was the Eighteenth Amendment, and that with the repeal of that Amendment the power expired. The factors which were regarded as establishing the exaction as a penalty rather than a tax were thus summarized:

"Since 1878, the revised statutes have classified various forms of the liquor traffic for the payment of excises differing in amount according to the nature of the business. When the section exacting $1,000 additional from all persons engaged in the traffic in violation of State law was made a part of the revenue laws the amount of the tax due by the respondent under R. S. 3244 was $25.00. The so-called excise of $1,000 is forty times as great. It is ten times as great as the annual tax under R. S. 3244 for wholesale liquor dealers and brewers, and fifty times as great as that imposed upon dealers in malt liquors. If the imposts under R. S. 3244 were fixed in amount in accordance with the importance of the business or supposed ability to pay, the exaction in question is highly exorbitant. This fact points in the direction of a penalty rather than a tax.

"The condition of the imposition is the commission of a crime. This, together with the amount of the tax, is again significant of penal and prohibitory intent rather than the gathering of revenue. Where, in addition to the normal and ordinary tax fixed by law, an additional sum is to be collected by reason of conduct of the taxpayer violative of the law, and this additional sum is grossly disproportionate to the amount of the normal tax, the conclusion must be that the purpose is to impose a penalty as a deterrent and punishment of unlawful conduct.

"We conclude that the indicia which the section exhibits of an intent to prohibit and to punish violations of State law as such are too strong to be disregarded, remove all semblance of a revenue act and stamp the sum it exacts as a penalty. In this view the statute is clear invasion of the police power, inherent in the States, reserved from the grant of powers to the federal government by the Constitution."

The far reaching implications of the doctrine that the United States may impose penalties for infractions of state laws were also emphasized:

"We think the suggestion has never been made—certainly never entertained by this Court—that the United States may impose cumulative penalties above and beyond those specified by State law for infractions of the State's criminal code by its own citizens. The affirmation of such a proposition would obliterate the distinction between the delegated powers of the federal government and those reserved to the States and to their citizens. The implications from a decision sustaining such an imposition would be startling. The concession of such a power would open the door to unlimited regulation of matters of State concern by federal authority. The regulation of the conduct of its own citizens belongs to the State, not to the United States. The right to impose sanctions for violations of the State's laws inheres in the body of its citizens speaking through their representatives. So far as the reservations of the Tenth Amendment were qualified by the adoption of the Eighteenth the qualification has been abolished."

In conclusion, the majority opinion referred to reliance on decisions holding that the motive for a tax may not be questioned, where the power to tax is conceded. Answering this contention, MR. JUSTICE ROBERTS said:

"The point here is that the exaction is in no proper sense a tax but a penalty imposed in addition to any the State may decree for the violation of a State law. The cases cited dealt with taxes concededly within the realm of the federal power of taxation. They are not authority where, as in the present instance, under the guise of a taxing act the purpose is to usurp the police powers of the State."

MR. JUSTICE CARDOZO was of the opinion that the judgment should be reversed. Indicating considerations supporting the view that the exaction is a revenue measure rather than a sanction of state police power, he said:

"Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. The gains in all likelihood will seldom be exhausted by a tax of $1,000. Congress may also have believed that the furtive character of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.

"Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or of their political subdivisions."

The minority opinion took issue also with the position of the majority that the statute, though designated a tax, is in reality a penalty. In regard to this, MR. JUSTICE CARDOZO said:

"The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface and by the purpose so imputed the statute is destroyed. Thus the process of psychoanalysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body or assume them to be wrongful. . . There is another wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion. . . The warning sounded by this court in the *Sinking Fund Cases*, 99 U. S. 700, 718, has lost none of its significance. 'Every presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' I cannot rid myself of the conviction that in the imputation to the lawmakers of a purpose not professed, this salutary rule of caution is

now forgotten or neglected after all the many protestations of its cogency and virtue."

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concurred with MR. JUSTICE CARDOZO.

The case was argued by Mr. Gordon Dean for the petitioner, and by Mr. William S. Pritchard for the respondent.

Corporations—Liability of Promoters—Action by Receivers of Corporation

Where promoters of a corporation fraudulently represented the value of properties the corporation was about to acquire and develop, and through manipulation of subsidiary companies caused the corporation to issue stock, mortgage bonds and notes greatly in excess of the value of the property to be acquired, and, by sale of the properties through a subsidiary to the issuing corporation, at a price greatly in excess of their appraised value, seriously depleted the assets of the latter to the point of insolvency, and reaped the benefit of such depletion, the promoters are liable to a receiver appointed for the issuing corporation, to the extent that they profited by the wrongful diversion of corporate assets.

McCandles v. Furlaud, 80 Adv. Op. 74; 56 Sup. Ct. Rep., 41.

This opinion dealt with a suit brought by the receiver of an insolvent corporation to recover from the promoters of the corporation and their confederates on account of unlawful depletion of the assets of the corporation, whereby it was made insolvent, and creditors defrauded. The Supreme Court, by divided bench, sustained the receiver in his right to the remedy sought. MR. JUSTICE CARDOZO delivered the opinion of the majority. The details of the transaction are set forth in the opinion.

In the statement of these details, it appears that one Furlaud was the principal shareholder of Furlaud & Company, Inc., an investment banking house. The corporation is referred to in the opinion simply as Furlaud, unless otherwise stated. Furlaud and its associates controlled three other corporations: Kingston Corporation, Byron Corporation and Chaucer Corporation. Furlaud was interested in formation of a company for owning and operating gas fields in Western Pennsylvania. Kingston acquired gratuitously from one Reuter, an important shareholder of Byron, options on nine tracts of gas fields. Reuter had obtained the options gratuitously, but later Furlaud made a payment of $45,510 on them to make them binding, but title to the options remained in Kingston.

In order to get the title to the gas fields vested in Duquesne, a method of financing had to be worked out. Furlaud employed two engineers to make appraisals of the gas fields. One appraiser reported values on certain tracts which were unsatisfactory to Furlaud, because the appraisal was too low. Other appraisers were then engaged who appraised the nine tracts at approximately $7,000,000, though the purchase price was $2,572,989. A witness testified that the fair value of all was about $2,700,000.

Furlaud then formed a syndicate to market securities to be issued by Duquesne, organized and dominated by Furlaud. It was organized with an authorized capital of 1,000 shares of no-par value common stock. Furlaud acquired all of this for $500. The syndicate issued an advertisement inviting subscriptions for an issue of bonds and notes. There were to be $4,000,000—6% mortgage bonds to be sold at 97½ and $1,000,000—6½% mortgage notes to be sold at 98. The circular, captioned "purpose of issue" stated that "These bonds are issued by the corporation in connection with the acquisition of properties, and to provide cash for developments, extensions and other corporate purposes." A similar representation was made as to the notes.

Meanwhile Duquesne was making arrangements to satisfy the bankers. Still under Furlaud's domination, it voted to increase the capital stock to 1,250,000 shares. Furlaud subscribed for 139,000 shares, at 50 cents a share.

Duquesne shortly agreed with Kingston to take over the gas fields as soon as Kingston got title. The consideration to be paid was $3,015,000, or $565,100 in excess of what Kingston expected to pay to the grantors; $1,300,000 par value of the forthcoming bonds, and 535,000 shares of the common stock. Furlaud agreed to take all the forthcoming notes at a price of 88%; and $2,700,000 of the bonds at 90%.

The public offering was a great success, and it became clear that the public would absorb the entire issue. Furlaud then made arrangements for a bank to extend credit to Kingston to acquire the deeds to the gas fields, and arranged for a credit to itself to pay for the bonds. The bonds were then delivered to banking houses for distribution to purchasers. Nearly $2,000,000 were paid for at once, and the money turned over to Furlaud which applied it toward liquidation of the bank loan. The remainder of the story, and the effect of the transaction may be taken from the opinion itself:

"The loan had been fixed at the precise amount necessary to enable Furlaud to discharge its obligations to Duquesne. Of the credit for account of Furlaud, $2,430,000 was used to pay for $2,700,000 bonds at 90; $880,000 for $1,000,000 notes at 88; and $69,500 for 139,000 shares of stock at 50 cents a share ($3,379,500 in all). But Duquesne was no sooner in receipt of the money than it paid the greater part out again. Of the $3,379,500, $3,015,000 was paid back to the Trust Company to be credited to the account of Kingston. This canceled the Kingston loan, reimbursed the Trust Company for the $2,449,900 withdrawn earlier in the day to obtain title to the lands, and left $565,-100 over. This balance was not kept by Kingston. It was transferred at once to Furlaud; the circuit was then complete.

"Furlaud had been well assured, when it closed the title on April 9, that there would be no difficulty in disposing of every bond and note. The event justified its faith. Within a few weeks all the remaining bonds had been converted into cash. Also within a few weeks the notes had been sold in bulk for $861,097.69 to a firm of investment bankers. Even the worthless shares of stock were unloaded on the public. The shares that were to go to Kingston (535,000) and those that were to go to Furlaud (139,000) were taken in the name of Parisette, one of Furlaud's employees. Of the part belonging to Kingston, 85,000 shares were assigned to the Byron and the Chaucer companies, which sold them to the public through Bergen, a stock operator, for $850,000, $425,000 being paid to Byron and a like amount to Chaucer. What became of the other shares the record does not show.

"Checks and credits have now been traced through their bewildering entanglements. None the less when the process of analysis is over, it is legitimate to forget the details, and fix our minds on the results. The situation can be simplified without obscuring its essential features. Indeed only in that way will the realities of what was done be manifest.

"After all the circuits had been traveled from one company to another and back to the point of origin, what had been accomplished for Duquesne and Furlaud stood out in clear relief. Duquesne had the ownership of gas fields, worth at cost about $2,500,000, though extravagantly appraised at many millions more. It had also $365,000 for working capital. True it had received $3,379,500, but it had paid out at once $3,015,000. The working capital was the difference ($364,500) together with $500 received for the

first issue of its shares. These are the credit items that any balance sheet must show. The liabilities were the bonds and notes and the no-par shares of stock. The bonds and notes, when distributed to the public, became liens for $5,000,000, more than $2,000,000 in excess of the cost of all the assets with working capital included. The shares of stock, issued in vast quantities, had nothing of substance back of them. If cost and value were about the same, there was thus insolvency at the beginning as well as at the end, unless the proceeds of the securities were devoted to the uses of the debtor, as the circlars published in the newspaper in effect stated they would be. Nothing of the kind was done. The bonds and the notes, instead of being used by Furlaud and its allies for the benefit of Duquesne, were disposed of as their own and at a large profit to themselves. The record supports the inference that some of the shares of stock were used in the same way. The promoters and their confederates pocketed the spoils. Less than two years later the victimized company was in the hands of a receiver."

The District Court held the appraisal of the Duquesne assets excessive and fraudulent, and that, by force of the statements in the circular as to the purpose of issue, the proceeds of the subscriptions were chargeable with a trust for the benefit of Duquesne and the holders of its mortgage debt. The court gave judgment against Furlaud individually (Furlaud Company was then dissolved) and against Kingston for $1,554,779.73 with interest, being the difference between the proceeds of the bonds and the amount paid to Duquesne and devoted to proper uses. No recovery was allowed for the proceeds of the stock. The Circuit Court of Appeals reversed the judgment, taking the view that Kingston and Furlaud had acted with the knowledge and consent of Duquesne, and that since the promoters and their agents were the only stockholders, under the doctrine of *Old Dominion Copper Co. v. Lewisohn*, 210 U. S. 206, the corporation, its incoming shareholders and the receiver were bound by that consent, whatever remedies might be available to a defrauded creditor.

On certiorari this decree was reversed, and the decree of the district court modified to include recovery on account of the stock. The chief difference of opinion between the members of the court was as to whether the receiver was entitled to maintain the suit, under the rule invoked by the circuit court, or whether the proper remedy was by way of suit for recovery by defrauded creditors, who could show their reliance on the alleged misrepresentation.

At the outset of his discussion of the question of liability, MR. JUSTICE CARDOZO stated certain general rules as to the responsibility of promoters, and pointed out the possibility of limitation on the power of stockholders to consent to the acts of promoters. In this connection he said:

"Promoters of a corporation stand in a fiduciary relation to it to this extent at least, that they will be chargeable as trustees if they deal with it unconscionably or oppressively or in violation of a statute, unless the liability for such misconduct has been effectually released. . . To what extent the approval of all the shareholders will relieve them of that burden is a question not susceptible of answer without considering the nature of the wrong and the interests affected. To some extent their position is akin to that of directors, though the limits of their duty are less definite and certain. Even for erring directors, however, there may at times be absolution if all the shareholders are satisfied. . . The interests affected by approval will shape the power to approve."

Old Dominion Copper Co. v. Lewisohn was then referred to and distinguished on the ground that there was no fraud, and, although the promoters had issued stock to themselves of a par value much greater than the lands they conveyed to the corporation, stockholders coming in later had no better case than the earlier stockholders. Here, on the other hand, the effect of the promoters' conduct was to saddle the company with liens beyond the value of its assets, crippling the company at the outset. Denying the power of the stockholders to consent in such circumstances, the opinion adds:

"No consent of shareholders could make such conduct lawful when challenged by the receiver as the representative of creditors. If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been annulled either by the creditors directly or in their behalf by a receiver. . . The distinction between such a situation and the present is one solely of degree. This is not a case where at the time of issuing the securities the shareholders and the promoters were the only ones concerned. Here at the moment of the conveyance the interests of bondholders and noteholders were put in jeopardy by a division of the proceeds that would make their mortgage worthless. The promoters could not receive for themselves or deliver to subscribers the bonds and notes of the company secured by deed of trust until title had been acquired to the lands covered by the deed. On the other hand, they could not pay the purchase price and acquire title to the lands without the proceeds of subscriptions, the contributions of the public. All this was known to the shareholders and known to the directors, for the promoters were the shareholders and the directors men of straw. In its effect upon subscribers the transaction was the same as if the proceeds of the bonds and notes had been paid into the treasury of the company and then paid out to the directors for the use of their confederates. It was not within the power of the shareholders to legalize this waste to the detriment of others. It would not have been within their power to bring that result to pass though shareholders and promoters had been different persons, acting at arm's length. Still more clearly it was not within their power when shareholders and promoters were in substance the same persons. . . Consent in such conditions, so far as it gives approval to conduct in fraud of the rights of others, is a word and nothing more. It is not in concord with realities. There is no occasion to consider whether the corporation itself at the instance of new shareholders would be permitted to disaffirm the fraud and maintain a suit in equity for appropriate relief. We put that question by. Enough that the receiver has the requisite capacity. A court of equity has taken hold of the assets of this company, intangible assets as well as tangible, for administration as a trust in accordance with equitable principles. . . Included in those assets are moneys fraudulently diverted to the prejudice of creditors. There is power at the instance of the receiver to bring them back into the trust."

Further to distinguish the *Old Dominion Copper Co.* case, it was pointed out that here the acts in question were violative of a provision of the Pennsylvania Constitution, forbidding the issue of securities except for money, labor done, or money or property actually received.

Discussion of liability for the stock next followed. As to this, the view was taken that since the stock was part of what came to the promoters as a result of their conspiracy, it or its proceeds were subject to a trust.

"Furlaud and Kingston, having made themselves parties to a scheme whereby Duquesne was to be despoiled and its creditors were to be defrauded, became accountable, we think, for everything that came to them as a result of the conspiracy in excess of the consideration furnished on their side. They were not trustees as to the bonds and notes, and lawful owners of the shares, but trustees as to all, the transaction being a unit, infected with a common vice. Everything of profit arising out of the abused relation must now be yielded up. Even after this is done, reparation will be incomplete. Restitution of the profits will

not make up, without more, for the inadequacy of the overvalued land to return to the lienors their principal and interest. In such circumstances the shares like the bonds and notes must contribute what they can. The certificates, were they on hand, might be turned into the treasury of the company for sale, if they still had any value. The shares having been sold to others and the certificates being no longer subject to the mandate of the court, the trust that attached to them has been transferred to the proceeds, which when paid to the receiver will be used like other assets in reduction of the debts."

MR. JUSTICE ROBERTS delivered a dissenting opinion, in which he stated that though the promoters had reaped an unconscionable profit, that fact should not induce the courts to disregard settled principles.

"I think that the decree of the Circuit Court of Appeals should be affirmed. I concur in the view that the promoters of Duquesne Gas Corporation took an unconscionable profit which they reaped at the expense of a credulous and avid purchasing public. This fact, however much it may invite animadversion, ought not to induce the courts to disregard settled principles in an effort to deprive the respondents of the fruits of their scheme."

After a criticism of the pleadings as defective and, in some respects, self-contradictory, consideration was given to several aspects of the prevailing opinion. The first of these related to the holding regarding the stock, and the view urged that there was no right of action shown.

"The District Court held, and the Circuit Court of Appeals concurred, that the promoters were not answerable in respect of the no par value common stock issued to them and thereafter sold by them. This Court reverses the holding and makes them liable to account for all they received for the stock. This is in the teeth of *Old Dominion Copper Company v. Lewisohn*, 210 U. S. 206. There, as here, stock was issued for property. The claim was that the property was worth vastly less than the par of the stock issued for it. Additional shares were later subscribed for by the public. This Court, in a unanimous opinion, speaking by Mr. Justice Holmes, held that any wrong which had been done to the innocent subscribers could not be redressed in an action by the corporation. Here we have a much stronger case, for all the stock was subscribed for and taken by the promoters. There were no innocent subscribers. In such a situation the courts with practical unanimity hold that the corporation has no right of action."

MR. JUSTICE ROBERTS urged also that there was no sound basis for liability as to the notes and bonds.

"On its face the transaction under investigation amounted to this and nothing more: The promoters paid themselves an exorbitant price in bonds, notes, stock, and cash for property which they turned over to the corporation they had promoted. The bonds and notes thus acquired they sold in the open market and as principals. If in such sale they misrepresented the value of the security they are liable to those whom they deceived. This is not denied. It was stated at the bar that numerous actions had been brought against them on this basis. Although purporting to be purchasers of securities and sellers of the same in turn for their own account, they are now converted into trustees for the corporation which corporation they were in essence at the time of the transaction and which corporation had, therefore, full and complete knowledge of every factor in the transaction. This again is in the teeth of *Old Dominion Copper Company v. Lewisohn, supra.*"

The dissenting opinion also took serious exception to the ruling of the Court permitting the action to be brought by the receiver, and urged that this is a confusion of separate actions, resting on fundamentally different principles. This aspect of the case was discussed in the following portion of the opinion:

"It is of course true that a receiver represents creditors and stockholders; but the proposition is true only in the sense that what he recovers as assets of his corporation is dedicated first to the payment of creditors and afterwards to the liquidation of outstanding shares. It has never been doubted that his right of action for a fraud committed upon the corporation by a third person is no greater than and no different from that available to the corporation. It is a novel doctrine that, if individual creditors have at the date of the receivership their own causes of action against third parties for fraud or misrepresentation, upon the appointment of a receiver these causes of action are assigned in law to the receiver. We know of no authority for such a proposition and none is cited in the opinion of the court. Courts which have considered the question have decided against the right of a receiver to maintain a suit such as this one.

"The opinion goes further, and holds not only that these individual causes of action may be grouped in the receiver, but that he as assignee is not subject to the rules as to allegation and proof by which the bondholders would be bound in an action for fraud, misrepresentation or deceit. This is to confuse separate causes of action fundamentally differing both in their substance and in their incidents. Any amount recovered by the receiver in this action will go into the corporate treasury and be distributed therefrom to the creditors of the corporation. It appears from the record that the bondholders have brought a foreclosure suit upon their mortgage. They will in that action first avail themselves of the security pledged under the mortgage. They will become general creditors as to any amount by which their security is deficient. The record does not inform us how many such general creditors, —sellers of merchandise lenders on unsecured paper, or employees and the like,—there are. Certainly these have no equity and no vestige of claim against the promoters arising out of the promotion of the Duquesne Corporation. And yet a recovery here will inure to their benefit as well as to that of the bondholders. If, as is said, the receiver represents the bondholders, shall the obtaining of a decree in this action operate as *res judicata* in the other actions brought by bondholders and now pending? The opinion does not answer the question. It seems clear that a suit by the receiver must be in the right of the corporation, and that the most he can claim is what the corporation could claim, namely, a derivative right of suit based upon fraud perpetrated upon innocent shareholders who were such at the time of the consummation of the scheme. Upon the facts pleaded and proved there can be no such derivative right in this case."

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concurred in the dissent.

The case was argued by Mr. Ralph Royall for the petitioner and by Mr. Louis B. Epstein for the respondents.

Courts—Equitable Jurisdiction of Federal Courts—Multiplicity of Suits

Although the federal courts have jurisdiction over suits in equity brought to avoid multiplicity of suits, their equitable powers in respect of such suits should not be exercised, where the advantage to the plaintiff is slight, in comparison with the disadvantages imposed on the defendant. Where only two suits at law would be avoided, each involving less than the jurisdictional amount for removal, the advantage to be gained by the exercise of the equitable jurisdiction for the prevention of multiplicity of suits alone, cannot be said to be greater than the disadvantage to the plaintiffs in the suits, including the deprivation of the right of trial by jury in the State Court.

Giovanni et al v. Camden Fire Insurance Association, 80 Adv. Op., 57; 56 Sup. Ct. Rep.

This case involved a question as to the jurisdiction of the federal courts. It arose in a suit in equity, brought by the Insurance Company, a New Jersey company, in a federal court in Missouri, against petitioners, citizens of Missouri, to cancel two fire insur-

ance policies. One policy, for $3,000, was issued to the petitioners, husband and wife, to insure them against loss by fire of a building, which they hold as tenants by the entirety. The other, for $1,500, was issued to the husband to insure his personal property.

The trial court dismissed the suit for want of jurisdiction, on the ground that the amount in controversy did not exceed $3,000. The Circuit Court of Appeals reversed. On certiorari, the Supreme Court reversed the decree, in an opinion by MR. JUSTICE STONE.

The bill of complaint set up that the petitioners had procured policies in excess of amounts they had agreed on, and then caused the property to be destroyed by fire, in execution of a conspiracy. It further alleged that the petitioners had filed claims with the respondent, and were about to sue to recover the full amounts of the policies. In reversing the trial court, the Circuit Court of Appeals took the view that the requisite jurisdictional amount was supplied by the expedient of seeking cancellation of both policies, whereby the amounts might be united, and in the aggregate exceed $3,000.

The opinion calls attention to the recent ruling in *Enslow v. New York Life Insurance Co.*, 293 U. S. 379, where it was held that equity will not compel cancellation of a policy procured by fraud, where the loss has occurred, and a suit at law is pending or threatened, to recover the amount of the policy, where the defences can be litigated at law.

The provisions of Section 24 of the Judicial Code were next considered. They restrict the jurisdiction of the district courts to controversies wherein the amount involved exceeds $3,000. In commenting on the effect of these provisions, MR. JUSTICE STONE observed that want of the jurisdictional amount is not a ground for invoking the equity powers of a federal court. In this connection he said:

"But want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity powers. The statute forbids resort to equity in the federal courts when they afford adequate legal relief. It does not purport to command that equitable relief shall be given in every case in which they fail to do so. Plainly it does not so command when the want of legal remedy is due to the express prohibition of Congress, applicable alike to suits at law and in equity."

The Court then approached the question whether the possible inconvenience of trying two cases at law instead of one was sufficient to invoke the equity power of the court, under the circumstances disclosed. This issue was thus stated:

"As the nature of the relief sought, cancellation of the insurance policies, and the inability of the federal courts to hear the suits at law for want of the jurisdictional amount, do not warrant equitable relief, it is evident that the remedy which respondent seeks depends on the slender thread of its right to ask the federal court of equity to save it the possible inconvenience of trying two law suits instead of one. Avoidance of the burden of numerous suits at law between the same or different parties, where the issues are substantially the same is a recognized ground for equitable relief in the federal courts. . . But the award of this remedy, as of other forms of equitable relief, is not controlled by rigid rules rigidly adhered to regardless of the end to be attained and the consequences of granting the relief sought. It rests in the sound discretion of a court of equity and a theoretical inadequacy of the legal remedy may be outweighed by other considerations."

The opposing considerations were then weighed to determine whether the suit in equity should be entertained. While it was not denied that circumstances might warrant the maintenance of a suit in equity to avoid two actions at law, it was thought that here the countervailing factors outweighed the plaintiff's advantages. Among the countervailing elements was the disadvantage to the defendants of depriving them of the right to trial by jury, and the policy of Congress to limit the jurisdiction of the federal courts as to the amount in controversy, and to preserve to the state courts jurisdiction of cases involving less than the statutory amount. As to the latter consideration, MR. JUSTICE STONE said:

"Finally it is to be noted that this tenuous ground for the exercise of equity powers is put forward as the sole medium by which suits may be withdrawn from the jurisdiction of the state courts which could not have been removed to or otherwise brought into the federal courts. While the consequences of the court's grant of equitable relief cannot affect its power, they nevertheless have an important bearing on the exercise of the judicial discretion which must guide a court of equity in determining whether it should grant or withhold a remedy which it is within its power to give. Its discretion may properly be influenced by considerations of the public interests involved. . . The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judicial sections of the Constitution. Congress, by its legislation, has declared its policy that cases involving less than the jurisdictional amount be left exclusively to the state courts, except that a judgment of the highest court of the state adjudicating a federal right may be reviewed by this Court. . . Courts of equity, in the exercise of their discretionary powers, should recognize this policy by scrupulous regard for the rightful independence of the state governments and a remedy infringing that independence, which might otherwise be given, should be withheld if sought on slight or inconsequential grounds. . .

"We think the threatened injury to respondent is of too slight moment to justify a federal court of equity, in the exercise of its discretion, in according a remedy which would entail denial of a jury trial to the petitioners and withdraw from the jurisdiction of the state courts suits which could not otherwise be brought into the federal courts."

The case was argued by Mr. Harry L. Jacobs for the petitioners, and by Mr. Walter A. Raymond for the respondent.

Negotiable Instruments—Holder in Due Course—Bad Faith in Taking Instrument

In the absence of an authoritative ruling by the state court of last resort construing its Negotiable Instruments Law to the contrary, under the rule applicable in the federal courts, proof that the purchaser of a negotiable instrument had received a notice circulated generally among dealers that certain bonds of a large issue had been stolen, is not sufficient to show actual notice of a defect in title or a taking in bad faith, at the time of the purchase.

Graham v. White-Phillips Co., Inc., 80 Adv. Op. 62; 56 Sup. Ct. Rep., 21.

This case arose out of a proceeding, brought by the Treasurer of Illinois, to determine the ownership of eight $1,000 negotiable coupon bonds issued by the State. The bonds were stolen from the petitioner August 30, 1930, and purchased by the respondent at a fair price on September 22, 1930, in the ordinary course of business through its Chicago office from a listed dealer at St. Paul, Minnesota.

Three days after the theft the owner caused the Foreman Corporation to send printed notice of the theft to dealers throughout the country.

The District Court gave judgment for the peti-

tioner; but the judgment was reversed by the Circuit Court of Appeals. On certiorari, the latter ruling was affirmed by the Supreme Court in an opinion by MR. JUSTICE MCREYNOLDS.

In a review of the record, it was observed that no circumstance suggested conscious wrongdoing by the purchaser. It appeared that the notice of theft was received by the respondent's main office in Davenport and at the Chicago branch, before the purchase; that there was absence of ordinary care at the Chicago branch, through failure to disseminate more widely the knowledge given by the notice; that respondent paid full value; that it had no actual knowledge of the theft at the time of the purchase; that it made no investigation, other than to inquire concerning the status of the party offering the bonds; and that the information given by the notice had been forgotten.

The District Court concluded as a matter of law, that, by reason of having received the notice, the respondent could not be a holder in due course, but that the knowledge contained in the notice made the purchase amount to a taking in bad faith.

The Illinois Negotiable Instruments Act provides that to constitute notice of a defect in the title, the person to whom the instrument is negotiated must have had "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amount to bad faith."

The Circuit Court of Appeals ruled that the respondent should be protected against a charge of bad faith which has nothing to support it other than the receipt of a notice circulated generally among dealers that certain bonds of a large issue had been stolen, Affirming this view, MR. JUSTICE MCREYNOLDS gave attention to the petitioner's contention that the Supreme Court of Illinois has construed the statute to mean that, since the respondent had received information of the theft, there was bad faith as a matter of law, and no title passed. Although recognizing that, under *Burns Mortgage Co. v. Fried*, 292 U. S. 487, the federal courts are bound by a definite construction placed upon the negotiable instrument law by the court of last resort of the state, it was concluded that there has been no such authoritative ruling on the point in Illinois. In this connection, it was noted that *Northwestern National Bank v. Madison and Kedzie State Bank*, 242 Ill. App. 22, was not a ruling of the court of last resort, nor building on the local tribunals. The Supreme Court of Illinois had merely denied an application for certiorari, which imports no approval of the reasons assigned by the lower court for its judgment.

Finally, a consideration of the question and a review of the authorities led to the conclusion that the judgment should be affirmed. In this connection MR. JUSTICE MCREYNOLDS said:

"In a contest over title to stolen negotiable bonds, the Supreme Court of Michigan recently considered the Uniform Negotiable Instrument Law of that State. *National Bank v. Detroit Trust Company* (1932), 258 Mich. 526-536, 537. It held that one may purchase stolen negotiable bonds and acquire valid title as a holder in due course, although before the purchase, notice of the theft had come to him; but he may not willfully close his eyes to the notice, or resort to trick or artifice to avoid knowledge of its contents, or purposely forget it. He must act in good faith."

* *

"The doctrine approved in Michigan should be accepted by the Federal courts, in the absence of an authoritative ruling in the state whose laws apply. It accords with what this court said in *Goodman v. Simonds*, 20 How. 343-365, 366, 367; *Murray v. Lardner*, 2 Wall. 110; *Vermilye & Co. v. Adams Express Co.*, 21 Wall. 138-146; *Shaw v. Railroad Co.*, 101 U. S. 557-564; and *King v. Doane*, 139 U. S. 166-173. Also with the view long enforced in England. *Raphael v. Bank of England* (1855), 33 Eng. Law and Eq. R., 276; *London Joint Stock Bank v. Simmons*, Appellate Cases 1892, 219; *Venables v. Baring Bros. & Co.* (1892), 3 Ch. Div. 527. Likewise with the conclusions of many state courts and writers of text books, as is pointed out in Daniel on Negotiable Instruments, 7th Ed. (1933), Secs. 885, *et. seq.*, and the accompanying notes."

The case was argued by Mr. James J. Barbour for the petitioner, and by Mr. William L. Patton for the respondent.

Taxation—Federal Transfer Tax

Under Sections 800, Schedule (A) (2) and 800 (A) (3) of the Revenue Act of 1926, both an original issue tax and a transfer tax are applicable to the issuance of shares of stock in a consolidated corporation to stockholders of the constituent companies conveying their assets to the new corporation, even though the consolidation agreement provides for the issuance of the new shares directly to such stockholders, rather than to the constituent corporations themselves and a retransfer to their stockholders.

Raybestos-Manhattan Inc. v. United States, 80 Adv. Op., 42; 56 Sup. Ct. Rep., 63.

This opinion dealt with a question as to the application of § 800 (A) (3) of the Revenue Act of 1926. The question presented was whether the issue by the petitioner of shares of its stock to stockholders of two other corporations in exchange for the assets of the latter, under a consolidation plan, involved a transfer under the provision in question.

The Court of Claims held the tax applicable, and on certiorari its ruling was affirmed by the Supreme Court, in an opinion by MR. JUSTICE STONE.

Section 800, Schedule (A) (2) imposes a tax on the original issue of corporate stock. Section 800 (A) (3) imposes a like tax

"On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or . . . of interest in property . . . in any corporation, or to rights to subscribe for or to receive such shares or certificates whether made upon or shown by the books of the corporation . . . or by any paper or agreement or memorandum or other evidence of transfer of sale. . ."

Liability for the tax is imposed on the transferor, the transferee and the corporation.

The petitioner was organized under New Jersey law, as a step in carrying out a plan and agreement for the consolidation of three other corporations. Two of the corporations conveyed their property to the petitioner in return for a specified number of its shares of stock issued directly to the stockholders of the corporations conveying their assets. The Court assumed that the agreement was that the shares were to be issued directly to the stockholders, without further intervention of the corporations. The petitioner, not questioning the original issue tax, contended that no transfer tax was applicable, since the stock was issued directly to the stockholders of the two constituent corporations, and that there was, therefore, no transfer from them to their shareholders. The Court, however, thought that the statute was not to be construed so narrowly.

The reasoning underlying the Court's conclusion is stated in the following portion of MR. JUSTICE STONE'S opinion:

"The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax

every transaction whereby the right to be or become a shareholder or to receive any certificate of any interest in its property is surrendered by one and vested in another. While the statute speaks of transfers, it does not require that the transfer shall be directly from the hand of the transferor to that of the transferee. It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another. Even the ownership of a share of stock, transfer of which is admittedly taxed, is not transferred directly from one to another as is title to a chattel or to real estate. Transfer of title to the shares is effected by a form of novation by which the right of the shareholder is surrendered to the corporation in return for its recognition of a new shareholder designated by the tansferor and the issue to him of a new certificate of stock. It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation.

"The subject of the tax is not alone the transfer of ownership in shares of stock. It embraces transfers of rights to subscribe for or receive shares or certificates whether made upon the books of the corporation 'or by any paper, agreement, or memorandum or other evidence of transfer. . .' In the present case the generating course of the right to receive the newly issued shares of petitioner was the conveyance to it of the property of each of the corporations to be consolidated. The new shares could not lawfully be issued to any other than the grantor corporation without its authority, and that authority could not be exercised for the benefit of third persons other than its own assenting stockholders. The consolidation agreement thus imposed the duty on petitioner to issue the new shares upon receipt of the property, and at the same time made disposition to the stockholders of the two corporations of the correlative right to receive the stock.

"We think that this effective disposition of the right to receive the stock involved a taxable transfer quite as much as if the several legal relationships of the parties had been established at different times and by separate documents. It is not doubted that there would have been a taxable transfer if each corporation had conveyed its property to petitioner in exchange for its shares of stock to be issued as the grantor might direct, and had later ordered the certificates to be issued to its stockholders. The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements. But we do not discern even a technical difference of any significance between such a transaction and that now before us, where the same duty to issue the stock is created and the same shift of the beneficiaries of it is effected simultaneously in a single document. No convincing reason is suggested why the Act should be thought to tax the one and not the other."

The case was argued by Mr. Charles H. Le Fevre for the petitioner, and by Mr. A. F. Prescott for the respondent.

Procedure—Intervention—Real Party in Interest—Counterclaim

One who is permitted to intervene as defendant may not file a counterclaim against the plaintiff arising out of a controversy solely between the intervenor and the plaintiff, which might be adjudged in a separate suit, and in which the original defendant is not an interested party.

Chandler & Price Co. v. Brandtjen & Kluge, Inc., et al, 80 Adv. Op., 28; 56 Sup. Ct. Rep., 6.

This case involved a question as to the proper procedure in regard to the filing of a counterclaim by an intervening defendant in a suit in equity in the federal courts.

Brandtjen & Kluge, Inc., brought suit in the District Court (Eastern New York) against Freeman, Inc., alleging ownership of a patent (No. 1,363,200), for "Improvements in Automatic Feed and Delivery for Platen Presses," and that the defendant is using an infringing printing press. An injunction and accounting were sought. Before the defendant answered, Chandler & Price Company applied for leave to intervene as a party defendant.

In its application for leave to intervene, the petitioner stated that it made and sold to the defendant a printing press, of which the plaintiff complains, and that it intends to defend the suit. It also stated that the plaintiff's claim of infringement and threats of suits against users of its printing press had injured its business and harassed its customers; that, although the plaintiff had long known that the intervenor's presses were sold throughout the United States, the plaintiff did not sue the intervenor; and finally, that the defendant had not sufficient interest in the result of the litigation to defend the suit on its own account.

On this showing, the intervenor was permitted to intervene as a defendant in the cause. In its answer, however, the intervenor set up a counterclaim on another patent (No. 1,849,314), for "Improvements in Sheet Transferring Mechanism for Printing Presses" owned solely by the intervenor, and sought a decree of injunction and an accounting against the plaintiff. On the plaintiff's contention that the counterclaim sets up a cause of action to which the original defendant is a stranger, the counterclaim was dismissed. This ruling the Circuit Court of Appeals affirmed. On certiorari the latter decree was affirmed by the Supreme Court in an opinion by MR. JUSTICE BUTLER.

It was noted first that the controversy is not with respect to the right to intervene, but is in relation to the right to bring the counterclaim into the suit. The Court, however, discussed the right of intervention, and pointed out that there was no showing that the petitioner was entitled to intervene as a matter of right, nor that it rather than the defendant was the real defendant in interest.

"Intervenor insists that it, rather than the defendant sued, is the real party in interest and that its counterclaim should be permitted so that the entire controversy between the real parties may be settled in a single suit. But intervenor's legal position in relation to the case differs essentially from what it would have been had the bill named it as a defendant and alleged a cause of action against it in the infringement suit. Undoubtedly in such a case the petitioner, whether or not suable in that district (§48, Judicial Code) would have had the right to enter its appearance and make its defense, and also to set up counterclaim against plaintiff. . . Here plaintiff's alleged cause of action is use by the defendant of a single machine alleged to infringe patent No. 1,849,314 owned by intervenor and made the basis of the counterclaim in question. The bill neither alleges any cause of action nor prays judgment against the intervenor. Petitioner was not sued and, until granted leave to intervene, it was a stranger to the suit. The facts alleged in its application were not sufficient to show that as a matter of equitable right petitioner is entitled to intervene. . . The showing presents a situation familiar in patent infringement cases brought against a user where the maker of the accused article is upon its application and in the discretion of the court permitted to intervene. . . The record discloses no foundation for the claim that the defendant sued is not, or that the intervenor is, the real defendant in interest."

The Court further stated that there was no showing that the issues involved in the counterclaim could not be separately adjudicated, and that the intervenor was not entitled to enter the suit in order to litigate a controversy solely between it and the plaintiff. In this connection, the Court adverted to the petitioner's contention based on Equity Rule 30, in contradistinction

to Rule 37. Rule 30 provides that "The defendant by his answer shall set out . . . his defense to each claim asserted in the bill. . . . The answer must state . . . any counterclaim arising out of the transaction which is the subject-matter of the suit, and may without cross-bill set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him. . . ."

Denying the petitioner's contention as to the interpretation of this Rule, MR JUSTICE BUTLER said:

"It is plain that the rule does not authorize one given the privilege to intervene as party defendant to set up and enforce against the plaintiff a counterclaim not available to the original defendant and in which it had no interest. Construction of the rule that denies intervenor the right to set up the counterclaim in question is supported by Equity Rule 37 which declares: 'Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention. . .' It is essential that the applicant shall claim an interest in the matters there in controversy between the plaintiff and original defendant. The purpose for which permission to intervene may be given is that the applicant may be put in position to assert in that suit a right of his in respect of something there in dispute between the original parties. Intervenor's counterclaim, involving nothing in which defendant is concerned, does not constitute the interest referred to in Rule 37.

"Exclusion from the litigation of that demand is consonant with reason and in the interest of justice. Introduction by intervention of issues outside those that properly may arise between the original parties complicates the suit and is liable to impose upon plaintiff a burden having no relation to the field of the litigation opened by his bill. . . In the absence of language definitely requiring it, the construction of Rule 30 for which the intervenor contends cannot reasonably be sustained. The counterclaim against the plaintiff was rightly dismissed."

The case was argued by Mr. Wallace R. Lane for the petitioner, and by Mr. Dean S. Edmonds for the respondent.

Taxation—Income Tax—Capital Net Gains

The date from which must be computed the two-year period of holding assets, for the purpose of the 12½% tax, is the date of the decedent's death rather than the date of distribution of the estate.

McFeely v. Commissioner of Internal Revenue, 80 Adv. Op., 44; 56 Sup. Ct. Rep., 54.

This opinion disposed of five cases involving, in varying form, a question as to the application of Section 101 of the Revenue Act of 1928, which permits taxpayers, at their option, to pay at the rate of 12½% on capital net gains. The material provision is: "'Capital assets' means property held by the taxpayer for more than two years. . . ." The question in controversy was whether property acquired from a decedent through intestacy, or a general bequest, is, within the meaning of the clause, held by a taxpayer from the *date of the decedent's death*, or from the *date of distribution*.

In an opinion by MR. JUSTICE ROBERTS, the Supreme Court by divided bench, concluded that the date from which the period is to be computed is the date of the decedent's death. Stating the contentions of the Commissioner and of the taxpayers, he said:

"The Commissioner contends that until actual distribution property cannot be said to be held by one having an interest in a decedent's estate, and, even if this be not true, Section 113 (a) (5), making value at the date of distribution the basis for calculating gain in such cases, requires that the word "held" in Section 101 (a) (8) be construed to set the same date as the time at which the holding shall begin.

"The taxpayers on the other hand assert that property is, in contemplation of law, held from the date of acquisition and one deriving property from a decedent's estate through devise, bequest or intestacy acquires the property at the date of death and holds it from that date; that so all prior acts using similar phraesology have been interpreted by the Treasury; that the re-enactment of these without significant change constitutes a legislative confirmation of the administrative interpretation; and that Section 113, having to do with the basis for the calculation of the tax, cannot alter the plain meaning of Section 101 which prescribes the length of time property must be held to constitute it a capital asset. We conclude that the date of the decendent's death is that from which the period of holding should be computed."

The basis for this ruling was thus explained:

"In common understanding to hold property is to own it. In order to own or hold one must acquire. The date of acquisition is then, that from which to compute the duration of ownership or the length of holding. Whether under local law title to personal property passes from a decedent to the legatee or next of kin at death subject to a withholding of possession for purposes of administration, or passes to the personal representative for the purposes of administration,—the title of the beneficiary, though derived through the executor, relating back to the date of death,—is for present purposes immaterial. In either case, the date of acquisition within the intent of the Revenue Act is the date of death.

"The Commissioner has heretofore administered the section upon this theory. As respects the Revenue Act of 1921, he so ruled in 1923, and again in a very full memorandum in 1924. It was stated in briefs and at the bar that these rulings have never been cancelled or revoked, and the statement was not challenged. The repetition of the definition without material change in the subsequent acts, including that of 1928, amounts to a confirmation of the administrative interpretation. There is nothing in the section, its history, or the administrative practice, to enlarge or alter the connotation commonly ascribed to the word 'held.'"

The Court then considered the Commissioner's contention that an examination of the whole statute discloses that the purpose was to alter the preexisting rule. In support of this, the language substituted by the Act of 1928 in respect of the basis date for determining value was relied upon. Dealing with this contention, it was noted that there was no change made in the language defining capital assets as property held by the taxpayer for more than two years. MR. JUSTICE ROBERTS then added:

"We think the argument cannot prevail. The Committee Reports disclose no purpose to alter the rule laid down in the earlier statutes and reenacted in Section 101 (a) (8). Congress must be taken to have been familiar with the existing administrative interpretation. The fact that the two sections deal with the same general subject—capital gains—is cited in support of the Commissioner's position that they ought to be consistently applied. There is, however, nothing novel in the naming of arbitrary 'basis' dates differing from the admitted dates of acquisition. . . .

MR. JUSTICE BRANDEIS, MR. JUSTICE STONE and MR. JUSTICE CARDOZO were of the opinion that judgment in each case should go for the Government, on the ground stated in *Ogle v. Helvering, Commissioner*, 77 Fed. (2d) 338.

The case was argued by Mr. H. B. Wassell for petitioner in No. 24, by Mr. Robert Driscoll for petitioners in Nos. 439 and 494, by Mr. George S. Fuller for respondents in No. 110, by Mr. Hugh W. McCulloch for respondent in No. 111, and by Assistant Attorney General Wideman for the United States and Guy T. Helvering, Commissioner of Internal Revenue.

THE TORT LIABILITY OF CHARITABLE INSTITUTIONS

Curious Differences in the Results Reached in Various States by the Decisions Dealing with This Question—Jurisdictions Which Deny All Liability to Strangers and Beneficiaries—The "Nuisance Doctrine" in South Carolina—States Holding Charitable Institutions to Same Liability as Ordinary Business Corporations—Decisions in Other States and Principles Which Underlie Them—The Trust Fund Doctrine—Public Policy etc.

By JOHN A. APPLEMAN
Member of the Peoria, Illinois, Bar

THE purpose of this article is to examine the liability of charitable institutions towards recipients of its charity and to strangers or persons not recipients of such charity for the negligent and tortious acts of their servants and employees, and for injuries sustained as a result of defects in premises improperly maintained. These questions have long been matters of serious controversy. Courts have quoted extensively from other jurisdictions, from text-writers, and from encyclopedias of law. Rash statements have been made concerning the weight of authority upon the question—courts on diametrically opposite sides of the question each claiming its own decision supported by the preponderance of cases. Nearly all analyses have been so inaccurately made that the writer was unwilling to use any material other than the decisions of the courts in the various states. Consequently, the treatment herein consists of an analysis of the result reached in each state for which cases could be found and a citation of the supporting case or cases. Results, it is suggested, are more important than the theory that the court uses to justify the decision reached. Bearing this in mind, the cases are classified herein as to results rather than as to theory.

Fine distinctions and differentiations by several courts cause otherwise clear decisions to lose their decisiveness. Massachusetts, Pennsylvania and Tennessee, for example, attempt to distinguish between torts committed when the charity is being administered directly and when property of the charity is being utilized to raise money to carry out that charitable purpose. It is submitted that such distinctions as this are futile. So, if we found two charitable hospitals operating side by side, each owning a half interest in the other, and using the income therefrom to carry out its charitable purpose, each would be liable for torts of its employees while in the other hospital but not while in its own. Correspondingly, if they traded those interests to each other so that each owned its own building exclusively, each would divest itself of such liability. Trust property is given to a charity in order that the income therefrom will maintain the institution. If the institution is to be exempt as to a portion of the property thus given, there is no reason of logic or of policy that demands that it be held liable as to another portion of such property; if it be held liable for part of its trust property, logically then, the same rule should be applied to all. The individual result matters not as much as consistency—it is, indeed, the constant vacillation of some courts that has caused the evident confusion.

One more thing must be borne in mind. It is necessarily true that where an attempt is made to deduce general principles from court dicta such language may be misinterpreted and the court thereby cast into the wrong classification. Also, cases or statutes may have been decided or passed of which the writer, with limited library facilities, may be unaware, and this may deflect the accuracy of this article to some degree. It is felt, however, that this will be true in very few cases—that in the great majority of the states all the recent cases have been examined and the material brought up to recent date. No material was found in North Dakota, South Dakota, Delaware, Idaho, New Mexico, Florida, or Vermont. The other states are treated herein.[1]

Perry, an eminent authority on trusts, stated: "It is almost universally held that those who are receiving the benefits of the charity, for example, patients at a charitable hospital or pupils at a school or college which is a public charity, cannot recover from the corporation or from the trustees for injuries due to the negligence of an employee where it does not appear that there was negligence in selecting the employee. . . . In some of the decisions the reason given is that the use of charitable funds for the payment of damages would be a diversion of the funds to an unauthorized purpose. Other decisions have been based upon the reasoning that the principle of *respondeat superior* entirely fails of application in cases of charitable trusts of a public nature, since the trustees or the corporations are not conducting the charities for profit to themselves or to the portion of the public which they serve. The courts which proceed upon this principle exempt the charitable corporation, or the trustees of an unincorporated charity, from liability for torts of agents or employees committed upon those who are not recipients of the charity." [2] This statement is clear and concise and, with the exception of the last assertion, is in the main correct. It serves to introduce the underlying principles of the subject to the reader.

Illinois applies the rule that a charitable institution is liable neither to beneficiaries nor to strangers to the charity under any circumstances. The famous

1. Professors of tort law at the colleges of Law at the state universities of Florida, North Dakota, and Idaho have reported their inability to find cases in those states. The others have not been heard from as yet.

2. Perry, Jarius—*A Treatise on the Law of Trusts and Trustees*—(7th Ed.), Vol. II, Sec. 745,—p. 1274-5.

case of Parks v. Northwestern University[3] asserted that rule as to beneficiaries, and the rule has since been extended to apply without restriction to third parties.[4] The trust fund theory is clearly the basis of reasoning upon which Illinois reaches the result given.[5]

Another important jurisdiction which denies all liability in the ordinary case to charitable organizations is Massachusetts. An early leading case upon this subject seeming to hold that there would be liability if negligence were shown in the selection of competent servants[6] was definitely overruled in a carefully considered case appearing in 1920.[7] The present rule has been extended to apply to third persons and strangers as well.[8] However, a certain exception is drawn by the court in 1930[9] in accordance with a suggestion in an early case, and the court imposed liability for a tort committed on premises of the institution devoted to the raising of money with which to carry on the charity. In other words, a distinction is drawn between torts committed in the direct administration of the charity and torts committed in deriving funds with which to carry on the charity. This distinction, later clarified by the same judge,[10] seems to be logical in theory but extremely futile in practical administration.

Missouri presents some of the most consistent and well-reasoned cases upon this subject,[11] coupling the more desirable ground of public policy[12] with the more common one of the trust fund doctrine[13] in order to reach the desired result. Its decisions settle the question clearly as to both strangers to the charity and as to beneficiaries.

Colorado,[14] Kentucky,[15] Maine,[16] Maryland,[17] Oregon,[18] Pennsylvania,[19] and South Carolina,[20] all seem

3. *Parks* v. *Northwestern University* (1905), 218 Ill. 381, 75 N. E. 991. "The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purposes of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution."

4. *Johnson v. City of Chicago* (1913) 258 Ill. 494, 101 N. E. 960. Here the driver of a truck belonging to the public library collided with an automobile driven by a third person. Here, clearly, the plaintiff was a total stranger to the charity. Regardless of this, the court in its dicta states: "A purely charitable organization is by the weight of authority held not liable for the torts or neglects of its servants in the performance of their duties in carrying on the work of such corporation." However, this is purely obiter, as the defendant was held not to be a charitable corporation.

5. The case of *Hogan v. Chicago Lying-In Hospital* (1929) 335 Ill. 42, 166 N. E. 461 is sometimes considered to be an authority upon the question of the inability of a stranger or third person to recover. However, the child born in a charitable maternity hospital is usually considered a beneficiary. The dicta of the case is sweeping enough to lend strength to the current interpretation inasmuch as the case adopts most of the language of the Parks case, leaving out the restrictions confining its application to beneficiaries. Another case in point is *Tollefson v. City of Ottawa* (1907) 228 Ill. 134, 81 N. E. 823

6. *McDonald v. Mass. General Hospital* (1876) 120 Mass. 432.

7. *Roosen v. Peter Bent Brigham Hospital* (1920) 235 Mass. 66, 126 N. E. 392. "The inevitable result of our own decisions is to relieve a hospital from liability for negligence of the managers in selecting incompetent subordinate agents as well as for the negligence of such subordinate agents selected with care." This was affirmed by *Glaser v. Congregational Kehillath Israel* (1928) 263 Mass. 435, 161 N. E. 619.

8. *Zoualian v. New England Sanatorium and Benevolent Association* (1918) 230 Mass. 102, 119 N. E. 686.

9. *McKay v. Morgan Memorial Co-op Industries and Stores Inc.* (1930) 272 Mass. 121, 172 N. E. 68.

10. *Reavey v. Guild of St. Agnes* (1933) 284 Mass. 300, 187 N. E. 557.

11. *Roberts v. Kirksville College of Osteopathy and Surgery* (1929) 16 S. W. 2d 625.

12. *Eads v. Y. W. C. A.* (1930) 325 Mo. 577, 29 S. W. 2d 701. "While it must be conceded that there are strong arguments in favor of holding a charitable organization liable for negligent injury to a servant or stranger, or for that matter even to a recipient of its charity therefore . . . the courts of this state, upon careful consideration, have decided it is better public policy to hold them exempt."

13. *Hope v. Barnes Hospital* (1932) 227 Mo. App. 1035, 55 S. W. 2d 319.

14. Colorado holds to a peculiarly pure trust fund doctrine. See *St. Mary's Academy of Sisters of Loretto of City of Denver v. Solomon* (1925) 77 Colo. 463, 238 Pac. 22, and *Brown v. St. Luke's Hosp. Ass'n* (1929) 85 Colo. 167, 274 Pac. 740. In the first case, the court makes the distinction that where the charity owns property extraneous to the trust funds, a judgment may be rendered against it as against an individual, but such judgment could not be paid out of the trust funds. Where the charity has none but trust property, it is clear that it is entirely exempt.

15. An early case held that a patient could not recover but refused to pass on the question of liability to strangers, or upon whether there would be liability if negligence in the selection of servants were shown. Three years later, the court passed squarely upon these issues and subsequently affirmed that decision. See *Emery v. Jewish Hospital Association.* (1921) 193 Ky. 400, 236 S. W. 577; *Pikeville Methodist Hospital v. Donahoo* (1927) 221 Ky. 538, 299 S. W. 159; *Williams Adm'x v. Church Home for Females and Infirmary for Sick* (1928) 223 Ky. 355, 3 S. W. 2d 753; *Van Pelt v. City of Louisville* (1934) 77 S. W. 2d 942.

16. Only one decision could be found in Maine upon this subject, but it seems to commit the state to the trust fund doctrine. If it does so, even though the decision pertains only to beneficiaries, the only logical result is that it will extend to third parties as well. *Jensen v. Maine Eye and Ear Infirmary* (1910) 107 Me. 408, 78 A. 898.

17. The early Maryland case of *Perry v. House of Refuge* (1884) 63 Md. 20 established the law in that jurisidiction, this decision being repeatedly affirmed. It was extended over later to apply to third persons, the trust fund doctrine being used: *Weddle v. School Comm'rs* (1902) 94 Md. 334, 51 A. 289; *Martin v. Moore* (1904) 99 Md. 41, 57 A. 671; *Loeffler v. Trustees of Sheppard and Enoch Pratt Hospital* (1917) 130 Md. 265, 100 A. 301.

18. In an early case, Oregon denied recovery to a child invitee, a stranger to the charity. The language is ambiguous and somewhat misleading. See *Hill v. President and Trustees of Tulatin Academy and Pacific University* (1912) 61 Ore. 190, 121 Pac. 901. In two later cases, however, this ambiguity is resolved in favor of the charity and the trust fund doctrine is adopted. *O'Neill v. Odd Fellows Home of Oregon* (1918) 89 Ore. 382, 174 Pac. 148; *Hamilton v. Cornwallis General Hospital Association* (1934) 146 Ore. 168, 30 Pac. 2d 9.

19. Decisions in this vast state were surprisingly hard to find. The early cases seem to commit Pennsylvania to the trust fund doctrine and this does not seem to have been reversed in any decision. This exemption would apply even when a stranger is the plaintiff. See *Fire Ins. Patrol v. Boyd* (1888) 120 Pa. 624, 15 A. 553; *Gable v. Sisters of St. Francis* (1910) 227 Pa. 234, 75 A. 1087; *Wildoner v. Central Poor District of Luzerne County* (1920) 267 Pa. 375, 110 A. 175; *Betts v. Y. M. C. A.* (1921) 83 Pa. Sup. Ct. 545 wherein the court refers to the inapplicability of *respondeat superior.* In *Winnemore v. Philadelphia,* 18 Superior 625, it appears that Pennsylvania falls in line with Massachusetts and Tennessee in holding that damages for injuries occurring on premises not directly used in the administration of the charity must be charged as other items of upkeep. This is perhaps the best reasoned of the cases adopting this type of modification. Since this case apparently is not reversed or overruled, it seems to state the Pennsylvania rule.

20. South Carolina commits itself in early cases to the trust fund doctrine, both as to beneficiaries and as to third parties. A strange exception to this doctrine will be noted a little later. In *Lindler v. Columbia Hospital* (1914) 98 S. C. 25, 81 S. E. 197, the court evades a direct decision of all the issues. Two years later, in *Vermillion v. Women's College of Due West* (1916) 104 S. C. 197, 88 S. E. 649, the broad exemption is placed on reasons of public policy. "The rule of total exemption is, perhaps, without exception based on grounds

to exempt the charity absolutely in the ordinary case —i.e., there must be some special or unusual circumstance to create liability in the charitable institution.

For example, South Carolina has allowed a recovery under the nuisance doctrine. Here the plaintiff owned a lot adjacent to Furman University, and his residences had been in considerable demand for rental purposes. A baseball lot was erected next to his premises, and the batting of balls upon his yard, the trampling of the garden in an effort to recover them, the great parking of cars, and noise managed to constitute a nuisance. He brought suit, praying for an injunction and damages in the sum of $5,000. Upon being non-suited by the lower court, he promptly carried up the decision. The higher court found it necessary to reconcile its new idea with that of the Vermillion case, but proceeded to allow the plaintiff his motion for a new trial, making it clear that he had an undoubted right to recover the damages he prayed for.[21] They placed their decision upon the ground that to deny the plaintiff a right to recover would be taking his property without due process of law contrary to the state constitution. So, South Carolina arrives at the peculiar result of denying recovery in all instances for personal injury but permitting recovery in one type of case for property damage. The result would seem to be that if the plaintiff had been struck and seriously injured by one of the batted balls in the instant case that he could recover for the property damage but not for the personal injury incurred. If the constitutional aspect of the question did bother the court to any degree, it seems that it could have been resolved favorably for the plaintiff by permitting an injunction to be granted but denying pecuniary damages. This was done in Illinois.[22] At all events, it should be remembered that no one has a vested right in any rule of law, and that property may be subjected to reasonable regulations for the public welfare. The restrictions of either Federal or State Constitutions are usually only considered to refer to action by or under the authority of some state instrumentality and not to the acts or encroachments of one individual upon another. It is usually conceded that a state need not give a remedy for a tort where the granting of such remedy would violate the public policy of the state. In other states where actions were brought to recover for tortious injury to property, the constitutional aspect did not enter into the court's consideration.[23] The writer believes that the constitutional question is extraneous to the problem—that it is really a cloak or subterfuge for the court's decision. We have, however, by this method found an arbitrary exception to the general rule obtaining in this state.

There seem to be only two states which hold charitable institutions directly to the same liability as the ordinary business corporation or individual. Those are Minnesota[24] and New Hampshire.[25] There is some question as to whether or not Alabama would fall within this classification. Its decisions will be discussed later. Minnesota, very clearly and without equivocation, holds that it would be undesirable public policy to grant any exemption whatsoever. New Hampshire discusses the trust fund theory at length and repudiates it as being contrary to that state's interpretation of the dictates of public policy.

Another line of cases arrive at the result of barring beneficiaries from any recovery under all circumstances, but where a third party is the plaintiff holding the charity to the same liability as any individual. Only five states would seem to be properly included within, and one of them, Rhode Island,[26] only falls partially within this group. The theory of implied waiver is the favorite ground for barring a recipient of the charity. A stranger to the charity has made no such waiver and can, therefore, recover as against any other organization.

Rhode Island seems to be the only state in which the public policy upon the question is determined in any degree by the legislature rather than by the court. The early rule which would allow a beneficiary to recover in any instance where negligence in selection appeared was changed to some extent by a statute which exempts a charitable incorporated hospital from liability to a recipient of the charity in any instance

of public policy . . . its logical applicaton requires exemption of public charities for the torts of their superior officers and agents as well as those of their servants or employees, whether these be selected with or without due care."

21. *Peden v. Furman University* (1930) 155 S. C. 1, 151 S. E. 907. "Appellant's action against Furman University is not based upon negligence or upon the principle of *respondeat superior*. He asks no damages against the university on account of the negligence of any of its agents or servants or of the university itself. — constitutes a nuisance and amounts to a taking of his property without just compensation first being had, contrary to the Constitution of South Carolina"—(This differentiation that the court attempts to make between property damage caused by the maintenance of a nuisance and other torts would seem to have no foundation in either logic or law.) "There is no doctrine of public policy that would permit the university to commit the acts of trespass, as alleged and testified to in this case, or to authorize it to so damage and use plaintiff's property in such a manner as amounts to a taking of his property. On the contrary, our courts have decided that not even a county or the state has the right to take the property of one of its citizens in violation of the constitutional provisions prohibiting the taking of property without just compensation first being made. . . . In our opinion, an eleemosynary institution cannot use its property in such a way as to prevent others from enjoying the use of theirs, and if it uses the property in such a manner as to become a nuisance, it makes them liable for damages."

22. *Deaconess Home, etc. v. Boutjes* 104 Ill. App. 484.

23. See *Phoenix Assurance Company of London v. Salvation Army* (1927) 83 Cal. App. 455, 256 Pac. 1106, where the plaintiff's car was wrecked by the negligent driving of the agent of the charity. Recovery was allowed under the California rule, with no mention being made of the constitutional question. See also 12 C. J. p. 1279 where it is stated that the public authorities may legalize uses of property which are nuisances for which an action would otherwise lie in favor of the injured person or community; and such acts do not deprive any person of property without just compensation. Citing *Bancroft v. Cambridge* 126 Mass. 438.

24. *Mulliner v. German Evangelical Synod* (1920) 144 Minn. 393, 175 N. W. 699; *Borwege v. City of Owatonna* (1933) 190 Minn. 393, 251 N. W. 915. Also *Geiger v. Simpson Methodist-Episcopal Church* (1928) 174 Minn. 394, 219 N. W. 463 where an interesting discussion of the problem is given, and the court holds that a charity must first compensate those injured in its operation before going further afield to dispense its benefits.

25. *Hewitt v. Women's Hosp. Aid Association et al.* (1906) 73 N. H. 556. It will be noted that this case is not recent and that it does not have all of the issues properly involved in a complete discussion of this problem directly before it. It seems, however, to be the only real expression of authority in this jurisdiction upon the problem. The language of the court, though dicta at the best, is sweeping and general enough in its scope to cover all situations presented to the court for decision, and definitely repudiates the trust fund doctrine.

26. See *Glavin v. The Rhode Island Hospital* (1880) 12 R. I. 411; *Basabo v. Salvation Army* (1912) 35 R. I. 22, 85 A. 120. These two cases, if strictly interpreted seem to indicate that a stranger could recover in any instance of negligence and that a beneficiary could also, unless the offending servant were a physician or nurse. In that situation, the court considers them the agents of the beneficiary and requires only due care to be exercised in their selection. This reasoning, it will be noticed, applies the theory of the inapplicability of *respondeat superior*.

whatsoever.[27] Further than that the statute does not go. So as to any type of charity other than an incorporated hospital, the common law would seem to remain in force. The rule as to the right of third parties to recover is definitely settled by the *Basabo* case, *supra*.[28]

States which seem to adhere to a more customary method of determining the public policy upon this matter—i.e., by the court, are Alabama,[29] Nebraska,[30] Michigan,[31] and Nevada.[32] While Alabama has not squarely decided the question of the right of beneficiaries to recover, the other issues are definitely settled. Michigan early applied the trust fund doctrine where cases involving beneficiaries were presented. In later cases where the plaintiff was not a recipient of the charity, the court restated the trust fund doctrine but seemed to agree that it would have no application where the plaintiff was not a beneficiary. The real basis of the decisions, therefore, would seem to be waiver and not trust funds. Where a suit was brought by a beneficiary couched upon the theory of implied contract to select competent servants, the Michigan court refused to be led astray from its position, stating: "Nor is there any magic in the use of one term instead of another when the gravamen of the act complained of is the negligence or mistake of a servant of an eleemosynary institution, exempted from liability by law under these circumstances."[33] The holding of Michigan would seem therefore, to accord precisely with the major premise of the states in this group. Nevada's holding, while dicta in some respects, is very clear on the question.

New York, because of its great number of holdings and the slight differences in the factual setup of each, has often been erroneously analyzed. Because of its minute technicalities and the importance of its decisions, it can scarcely be placed anywhere but in a separate classification. The trust fund doctrine was early rejected in this state.[34] Then after the doctrine of implied waiver had served as a basis for decision in the *Schloendorff*[35] case and in the Supreme Court holding in *Phillips v. Buffalo General Hospital*,[36] the Court of Appeals made it clear that affirmance in the latter case meant affirmance of the result only and not of the doctrine of waiver.[37] Thus Cardozo later in the case of *Hamburger v. Cornell University*[38] pointed out that, while the doctrine of waiver has not been expressly overruled, there is dicta both for and against it, with the latter predominant in the more recent cases. That is, it should be noted, in contravention to his own decision in the *Schloendorff case*. The strict limitations of the waiver doctrine proved unsuitable and we find that the court soon began to impose liability upon charities where due care was not used in the selection of non-administrative persons, such as physicians and nurses in hospitals, or professors and teachers in universities. It seems that a broader rule of liability might have been applied here but for the theory that the court adopts to fit this type of case—i.e., of the inapplicability of *respondeat superior*. In other words, the court chooses to consider such persons to be the agents or servants of the beneficiary and not of the charity,[39] but the cases do require that due care be used in the selection of such persons.[40] Some cases prove rather confusing to the hasty reader, as they speak of the exemption of the charity in such an instance without

27. General Laws of Rhode Island (1923) Ch. 248, sec. 95, p. 1011. "No hospital incorporated by the general assembly of this state, sustained in whole or in part by charitable contributions or endowments, shall be liable for the neglect, carelessness, want of skill or for the malicious acts of any of its officers, agents, or employees in the management of, or for the care or treatment of, any of the patients or inmates of such hospital." It goes on to make the offending individual personally liable. What the court would do if the injury resulted from a fall on defective premises and not from a personal injury inflicted by a servant or employee, is not quite clear from the above language.

28. "The defendant corporation, although it is a charitable corporation, is liable as any other corporation, for injuries to third persons caused by the negligence of its servants and agents in the care and management of its horses and teams while employed for its purposes, even though it is not shown or alleged that there has been any lack of care or diligence on the part of the defendant in the selection or retention of such servants or agents."

29. See *Tucker v. Mobile Infirmary Association* (1915) 191 Ala. 572, 68 So. 4. Also *Alabama Baptist Hospital Board v. Carter* (1932) 226 Ala. 109, 145 So. 443, and *S. L. O. W. L. O. O. M. v. Kenny* (1916) 198 Ala. 332, 73 So. 519. These cases permit recovery to strangers and to third persons, going so far as to allow recovery to pay patients. None deals directly with the right of recipients of the charity to recover, but the language seems to imply that recovery would be denied to them. This is, at best, dicta.

30. In *Duncan v. Nebraska Sanatarium Benevolent Association* (1912) 92 Neb. 162, 137 N. W. 1120, and in *Sibilia v. Paxton Memorial Hospital* (1931) 121 Neb. 860, 238 N. W. 751 Nebraska definitely denies all right of a patient to recover even though such patient has paid for services rendered. This rule is definitely stated not to apply to third persons in *Marble v. Nicholas Senn Hosp. Ass'n of Omaha* (1918) 102 Neb. 343, 167 N. W. 208, and *Wright v. Salvation Army* (1933) 125 Neb. 249, 249 N. W. 549. Thus as to third persons, the same liability exists as though the defendant were an ordinary business corporation.

31. In two early cases *Downes v. Harper Hospital* (1894) 101 Mich. 555, 60 N. W. 24, and the *Pepke* case 130 Mich. 493, 90 N. W. 278 the court has the question of the right of recipients of the charity to recover. It dicta sweepingly adopts the trust fund doctrine, and it appeared that the court would extend this to the case of third parties. In *Bruce v. Central Methodist Episcopal Church* (1907) 110 N. W. 951, 147 Mich. 236, and in *Gallon v. House of Good Shepherd* (1909) 158 Mich. 639, 122 N. W. 631 the court had the situation presented where the plaintiff was a stranger to the charity. The court in these cases permitted a recovery. In the discussion, they stated that it would be contrary to the dictates of public policy to leave the plaintiff without recourse and that the court would have no authority to make any exemption which could not be based upon implied contract or waiver. To do otherwise would be to permit the charity to go so far as to violate the law without permitting a remedy to the person injured thereby. In two later suits brought by beneficiaries the court again denies recovery with the sweeping language used in the early cases. Those early cases are cited and no reference is made to the intermediate cases in which third parties had been the plaintiffs. It is possible, therefore, that the present court disapproves of the *Gallon* case. After diligent search, the writer was unable to find any cases directly overruling the intermediate cases, and they still seem to represent the law. See *Bruce v. Henry Ford Hospital* (1931) 254 Mich. 394, 236 N. W. 813; *Greatrex v. Evangelical Deaconess Hospital* (1933) 261 Mich. 327, 246 N. W. 137.

32. The case of *Bruce v. Young Men's Christian Association* (1929) 51 Nevada 372, 277 P. 798 flatly rejects the trust fund doctrine and that of negligent selection, resting its decision as to a beneficiary on the basis of waiver. Thus, it states that a stranger may recover, but a beneficiary has no case whatsoever. This case gives an extensive discussion of the theories used by other states.

33. See *Greatrex* case, supra.

34. *Hodern v. Salvation Army* (1910) 199 N. Y. 233, 92 N. E. 626; *Kellogg v. Church Charity Foundation of Long Island* (1911) 203 N. Y. 191, 96 N. E. 406.

35. *Schloendorff v. Society of New York Hospital* (1914) 211 N. Y. 125, 105 N. E. 92.

36. (1924) 202 N. Y. S. 572.

37. (1924) 339 N. Y. 189, 146 N. E. 199.

38. (1925) 240 N. Y. 328, 148 N. E. 543.

39. *Phillips v. Buffalo General Hospital* supra; *Mills v. Society of the New York Hospital* (1934) 274 N. Y. S. 233; *Grawunder v. Beth Israel Hospital Ass'n et al* (1934) 272 N. Y. S. 171. See cases also in note 40.

40. *Hamburger* case, supra; *Barr v. Brooklyn Children's Aid Society* (1920) 190 N. Y. S. 296; *Goodman v. Brooklyn Hebrew Orphan Asylum* 178 App. Div. 682, 165 N. Y. S. 949.

mentioning that due care must be used in the selection of the offending individual.[41] It is clear that under the New York rule strangers or third parties may recover exactly as against the ordinary business corporation.[42] The question of whether or not there would be liability for the acts of ordinary administrative agents acting in an administrative capacity has not been squarely passed upon by the highest court. The eminent Cardozo goes so far as to assume in his dicta that in such a case liability would exist.[43] In 1934, a Supreme Court judge passed squarely upon the issue and ventured to overrule the dicta of the Court of Appeals, even citing certain of its language in support of his decision.[44] Whether or not this will stand will have to be determined by future cases. The writer is inclined to believe that from the reasoning in New York cases it is much more likely that the dicta of Cardozo will be squarely adopted. It will be noted in this connection that two New York cases have held the charity to an absolute liability where it performs an unlawful act—i.e., such as performing an unlawful autopsy.[45]

The greatest number of jurisdictions and probably the real weight of authority upon this question arrives at a result greatly similar to that of New York. The conclusion reached is that strangers and third parties may recover just as against an ordinary corporation or individual—it is no defense that the charity has exercised due care in the selection of its offending servant or employee. As to beneficiaries, however, the defense of the charity must be that it exercised due care in the selection and retention of its servants and employees. If such be not proved, the recipient of the charity may maintain an action against the charity successfully. (It will be noted that some jurisdictions cast the burden of proving such negligence upon the plaintiff.) Jurisdictions which follow this view are, namely, California,[46] Connecticut,[47] Indiana,[48] Iowa,[49] Louisiana,[50] Montana,[51] New Jersey,[52] North Carolina,[53] Ohio,[54] Oklahoma,[55] Texas,[56] Utah,[57] Virginia,[58] and West Virginia.[59]

There are a number of interesting things apparent in the discussion of the group of states herein involved. More than any other group of states, it tends to get away from legal fiction and the support of old theory. The decisions of practically every state discussed in this group rest upon the broad ground of public policy. The courts simply state that to them it is desirable public policy to require the charitable institution to use care in the selection of its employees, and, if they have done so, then to deny a right of recovery to persons who have sought its benefits. They further feel it undesirable to exempt a charity where the plaintiff is a stranger or third person. This casting aside of legal fiction is much to be commended.

41. *Mills v. Society of the New York Hospital*, supra; *Stearns v. Ass'n of the Bar of New York* (1934) 276 N. Y. S. 390; *Meshal v. Crotona Park Sanatarium, Inc.* (1935) 276 N. Y. S. 989.

42. See *Schloendorff*, *Grawunder*, *Hamburger*, and *Stearns* cases—all supra.

43. "For present purposes we assume without deciding that the defendant is liable in like degree to students and to strangers for the negligence of servants." 240 N. Y. 328, 148 N. E. 543. Since there is an absolute liability toward strangers for the negligence of servants, this necessarily assumes that the same would be true toward students, who are true recipients of the charity.

44. *Stearns* case, supra. "The exemption of charitable corporations from liability for the negligence of its agents and servants upon one theory or another, has been firmly established in the law of almost every state. . . As between the dispenser of public benevolence and the unfortunate victim of negligence, the law has determined to protect the former at the expense of the latter. As a matter of public policy, no distinction based upon logic or expediency can be made between administrative and non-administrative acts."

45. *Grawunder* case, supra. See also *Darcy v. Presbyterian Hospital* 202 N. Y. 259, 95 N. E. 695.

46. California adopts in clear language the holding that as to recipients of the charity (and pay patients are placed in this category) the only duty of the charity is to exercise due care in the selection of its servants and employees. *Thomas v. German Gen. etc. Soc.* 168 Cal. 183, 141 Pac. 1186, *Ritchie v. Long Beach Hosp. Ass'n* (1934) 34 P. 2d 771, and *Armstrong v. Wallace* (1934) 37 P. 2d 467. The rule as to the right of third parties to recover is set out clearly in *Phoenix Assurance Company of London v. Salvation Army* (1927) 83 Cal. App. 455, 256 P. 1106.

47. The holding of Connecticut is subject to some doubt. The early case of *Hearns v. Waterbury Hospital* held that a patient in the hospital is a participant in the charity and holds that there is no liability for the tortious acts of a servant selected with due care. (1895) 66 Conn. 98, 33 A. 595. The later case of *Cashman v. Meriden Hospital* (1933) 117 Conn. 915, 169 A. 915 states in one sentence that liability will exist where negligence is shown in the selection of incompetent physicians and nurses, and in another states: "The courts are practically agreed that a charitable institution is not responsible to those who avail themselves of its benefits for any injuries that may be sustained through the negligence of its managers, agents, or servants." It would certainly seem that negligence in the selection of servants is negligence on the part of the managers, and that the court's language is not as refined as it could be. See also *Hawthorne v. Blythewood* (1934) 118 Conn. 617, 174 A. 81. In a case involving the right of an invitee on the premises of a charity to recover damages, the court holds that since an invitee is not a recipient of the charity that he may recover as against any other property owner. *Cohen v. General Hospital Society of Connecticut* (1931) 113 Conn. 188, 154 A. 435.

48. An early Indiana case attempted to introduce the trust fund doctrine. *Williams v. City of Indianapolis* (1901) 27 Ind. App. 414, 60 N. E. 367. Later cases gradually shelved this doctrine until the result reached is that beneficiaries may recover if due care has not been used in the selection of servants and employees and that a third person or stranger may recover regardless of the care used in the selection of the offending agent. *Winona Technical Institute at Indianapolis v. Stolte* (1909) 173 Ind. 39, 89 N. E. 393; *Old Folks and Orphan Children's Home v. Roberts* (1925) 83 Ind. App. 541, 149 N. E. 188. Pay patients are placed as in most jurisdictions on the same basis as other beneficiaries. *St. Vincent's Hospital v. Stine* (1924) 195 Ind. 350, 144 N. E. 537.

49. One of the acutest lines of thought is drawn in the Iowa decision of *Mikota v. Sisters of Mercy* (1918) 183 Iowa 1378, 168 N. W. 219. Instead of the usual sweeping statement that if negligence were shown in the selection of the offending servant that recovery might be had by a beneficiary, the following is made: "When the injury is traceable to the negligence of the servant, there is no liability. If the case rested on the negligence of the defendant in the selection of incompetent servants, then it should appear affirmatively that the injury is traceable to such negligence. Even an incompetent servant may be negligent and if the injury is traceable to such negligence and not to the incompetency, then there is no liability under the rule herein before stated." Whether or not this distinction is wise is a matter of personal opinion, but the distinction is a nice one and Iowa seems to be the only state whch has expressed herself in this wise. The case does not have before it the problem of a third person as plaintiff, and any language pertaining thereto is only dicta. However, this dicta states definitely that an outsider or third person could recover.

50. It is not entirely clear whether the courts of Louisiana intend to permit recipients of the charity to recover if due care is not used in the selection of servants. The cases of *Foye v. St. Francis Sanatarium* (1925) 2 La. App. 305 and *Thibodaux v. Sisters of Charity of the Incarnate Word* (1929) 123 So. 466 expressly make this the test of liability. The former case places pay and charity patients on the same basis, and the latter case brings out expressly that the nurse in question had been selected with due care. The confusion arises from such cases as *Bougon v. Volunteers of America* (1934) 151 So. 797 and *Unser v. Baptist Rescue Mission et al.* (1934) 157 So. 298 which state that beneficiaries cannot recover and fail to mention whether or not due care in the selection of servants is necessary. Since these two cases are concerned primarily with holding that a third party or stranger can recover in any instance, their statements in regard to patients cannot be given too much authority.

Public policy is a thing which changes and adapts itself to public need—it is much more versatile than the hard shelled doctrine of trust funds or the inapplicability of *respondeat superior*.

It must not be assumed, however, merely because these states fall into the same general classification, that if the same case were presented in each one of them that identical results would be reached. Oklahoma, for example, is the only one of these states that places pay patients on the same footing as third persons—the other jurisdictions treat them as recipients of the charity. Other differences will be apparent to the careful reader upon study of the footnote cases. The holdings of Connecticut, Louisiana, Montana, New Jersey, North Carolina and Utah are still a little hazy because of the paucity of decisions directly upon the various questions. California, Iowa, Ohio, Texas and Virginia should be especially noted for their clear and concise holdings upon this question.

In the last group under discussion we may say in general that the states hold that a charity has an equal duty toward recipients of the charity and to third persons—the duty to exercise due care in the selection of servants and agents. If this duty be properly discharged, no liability will arise. If negligence be shown in the selection of employees, recovery may be had by either class of plaintiffs. It is probably in this group that the greatest vacillation appears. Some of the holdings, in particular, are especially peculiar. Kansas, for example, in two early cases[60] held that a recipient of the charity could not recover unless negligence were shown in the selection of the offending employee. In a later suit brought by a stranger to the charity, the court held that there could be no recovery, basing its holding on the theory of trust funds.[61] In the decision, the question of negligence in the selection of servants

It is probable, then, that Louisiana accords with the other states of this group.

51. Only one decision could be found in Montana relevant to the point in issue. It does not deal with the question of the rights of strangers or third persons, being concerned directly only with the right of a beneficiary to recover from a hospital maintained by the employer corporation. This case allows recovery to a recipient of the charity if due care be not used in the selection of the offending servants. See *Borgeas v. Oregon Shortline R. Co. et al.* (1925) 73 Mont. 407, 236 Pac. 1069. Because of the fact that this states only a modified view of the trust fund doctrine which would in reality seem to be more accurately classed as a type of waiver doctrine, it seems most logical that when the question of the right of a stranger to recover is squarely presented that such a recovery will be allowed as in the case of any other corporation.

52. It is clear from the New Jersey decisions that a third party may recover regardless of the care used in the selection of servants. See *Daniels v. Rahway Hospital* (1932) 160 A. 644; *Simmons v. Wiley-Methodist-Episcopal Church* (1934) 112 N. J. Law 129, 170 A. 237. As to beneficiaries, some doubt still exists as the court has refused to pass directly upon the issue of recovery when negligence is shown in the selection of servants until the question is squarely before it. The implication from two cases is that such negligence would probably afford a basis of recovery even to a charity patient. *D'Amato v. Orange Memorial Hospital* (1925) 101 N. J. Law 61, 127 A. 340; *Boeckel v. Orange Memorial Hospital* (1932) 108 N. J. Law 453, 158 A. 832.

53. This state early lays down the law that there is no liability toward beneficiaries (pay patients being classed as such) if due care is used in the selection of employees. *Barden v. Atlantic Coast Line Ry. Co.* (1910) 152 N. C. 318, 67 S. E. 971; *Green v. Biggs* (1914) 167 N. C. 147, 83 S. E. 553. It is also stated that liability will exist if no such care is used. *Hoke v. Glenn et al.* (1914) 167 N. C. 594, 83 S. E. 807. The liability toward strangers and third persons is not discussed. However, this state holds that a servant may recover as he is not a recipient of the charity. *Cowans v. North Carolina Baptist Hospitals, Inc.* (1929) 197 N. C. 66, 147 S. E. 672. If this reasoning is logically followed, it would naturally result in holding the charity to the same liability as an ordinary business corporation where a stranger to the charity were the plaintiff. The early cases are approved and brought up to date in *Johnson v. City Hospital Company* (1929) 196 N. C. 610, 146 S. E. 573.

54. The state of Ohio displays some of the most consistent and best reasoned holdings. The case of *Taylor v. Flower Deaconess Home and Hospital* (1922) 104 Ohio State 61, 135 N. E. 287 lays down the rule that beneficiaries may recover only if due care be not used in the selection of the offending employee. More recent cases holding the same way are *Walsh v. Sisters of Charity of St. Vincent's Hospital* (1933) 191 N. E. 791 and *City Hospital of Akron v. Lewis* (1934) 192 N. E. 140. In the case of *Sisters of Charity of Cincinnati v. Duvelius* (1930) 123 Ohio State 52, 173 N. E. 737, the court examines all reasons of policy and theories of law, finally determining that a charity must bear the same liability toward strangers and third parties as would any individual or business corporation.

55. This court discusses at length the doctrine of the Alabama court, holding that even a pay patient may recover for negligence of a nurse, if she were acting within the scope of her employment, whether or not due care was used in her employment. *City of Shawnee v. Roush* (1923) 101 Okla. 60, 223 P. 354. Certainly if a pay patient can recover, a stranger to the charity could as well. The following year, a well-reasoned case follows a statement from a popular digest in denying recovery to a beneficiary or charity patient, where due care was used in the selection of the offending servant. *Carver Chiropractic College v. Armstrong* (1924) 103 Okla. 123, 229 P. 641, quoting from 5 R. C. L. p. 375, art. 121, and adopting its language as the language of the court.

56. Texas seems to scorn the support of ordinary theory, and in most of its decisions arrives at the result desired without leaning on the prop of legal syllogism. As to third parties, the ordinary rule of *respondeat superior* is applied. See *St. Paul Sanatarium v. Williamson* (1914) 164 S. W. 36. Other cases hold that patients may recover only if negligence be shown in the selection of the offending agent of the institution, and pay patients are subjected to the same rule as purely charity patients. See *Barnes v. Providence Sanatarium* (1921) 229 S. W. 588; *Baylor University v. Boyd* (1929) 18 S. W. 2d 700; *Steele et ux. v. St. Joseph Hospital* (1933) 60 S. W. 2d 1083; *City of McAllen et al v. Gartman et ux.* (1935) 81 S. W. 2d 147; *St. Paul* case, supra.

57. The only case found in Utah upon this subject holds the particular defendant to be a non-charitable institution, so that any dicta on the question under discussion is purely obiter. The case discusses rather extensively the theory underlying the liability of charities. As to beneficiaries, the decision states that when the charity has attempted to accomplish a kindness that it would be unduly harsh to require a greater duty than that of using due care in the selection of servants. Since no kindness would be attempted toward an entire stranger to the charity, this reasoning would clearly not apply. The most logical deduction from the court's language is that when such a situation is presented to the court that it will impose the same liability as upon the average profit corporation. *Gitzhoffen v. Sister of Holy Cross Hospital Association* (1907) 32 Utah 46, 88 P. 691.

58. A Virginia case allows recovery to a stranger to the charity stating that no reason exists for exemption. *Hospital of St. Vincent of Paul in City of Norfolk v. Thompson* (1914) 116 Va. 101, 81 S. E. 13. A later case reiterates this doctrine, but confines the recovery of a recipient of the charity to situations where negligence in the selection of the offending employee appears. *Weston's Adm'x v. Hospital of St. Vincent of Paul* (1921) 131 Va. 587, 107 S. E. 785. This was in turn more recently affirmed. See *Norfolk Protestant Hospital v. Plunkett* (1934) 173 S. E. 363.

59. Since the writer was able to find only one case in point in this jurisdiction, the law in reference to the right of strangers to recover seems unsettled. The right of beneficiaries to recover is settled in the affirmative unless the charity prove clearly that it exercised due care in the selection of the offending servant. *Roberts v. Ohio Valley General Hospital* (1925) 98 W. Va. 476, 127 S. E. 318. In view of the language used by the court, however, and the extensive discussion therein of the Corpus Juris doctrine, it is felt that the attitude of the court would be to allow a recovery to a stranger to the charity under any circumstances. At best, however, this is a mere conjecture.

60. *Nicholson v. Atchison, Topeka & Santa Fe Hospital Association* (1916) 97 Kans. 480, 155 P. 920; *Davin v. Benevolent Association* (1918) 103 Kans. 48, 172 P. 1002.

61. *Webb v. Vought* (1929) 127 Kans. 799, 275 P. 170. There were two dissenting opinions in this case. "This court now prefers to follow that rule, and put it on the ground that the resources of charitable organizations are trust funds which cannot be subjected to the payment of damages in such cases."

is not even mentioned. In the Ratcliffe case,[62] a suit brought three years later by a patient in a charity, the court considers the question extensively as to whether or not negligence in the selection of the offending employee was present, making it clear that this is an integral part of the problem. The writer does not believe that the court intended to apply a harsher rule to third persons than to recipients of the charity—but a literal reading of the Webb case and an understanding of the meaning of the trust fund doctrine would leave no alternative. It is probable that, since in the Webb case the question of negligence in the selection of servants was not raised by allegation, the court saw fit to disregard it. The trust fund doctrine is too rigid in itself to allow any modification for the negligent selection rule. The most probable explanation is that the court wavered over to the trust fund doctrine in the Webb case and soon after decided that their earlier holdings applied the better rule. The court, therefore, reversed the theory applied in the Webb case to this extent.

Georgia offends the principles of logic much more than Kansas. This state held that neither beneficiaries, that is, charity patients, nor strangers to the charity could recover unless negligence be shown in the selection of the offending servant.[63] However, the court held that pay patients could recover regardless of the care used in the selection of servants up to the amount of money received from all such pay patients.[64] It is doubtful whether the courts of this jurisdiction intended this extraordinary result, i.e., allowing greater latitude to a pay patient than to an entire stranger to the charity. The reaffirmance of the Morton case in the Butler[65] case and in the Bazemore[66] case seems to leave Georgia in that peculiar position.

Tennessee is a third state perplexing in the extreme. Originally its courts embraced the trust fund doctrine.[67] Some time later, the courts saw fit to make the same modification that we have seen Massachusetts and Pennsylvania make.[68] That is, it held that where property is being used in order to raise money for purposes of the charity and is not being used or administered in the charity proper, recovery may be had for torts committed upon that property or in the course of its maintenance and operation.[69] Damages recovered for such torts, however, could only be collected out of similar property or funds—not out of property used directly in the administration of the charity. The *Love* case, decided in 1922, held that this recovery will generally be limited to strangers to the charity, and then goes on to allow, as did South Carolina, damages for the maintenance of a nuisance.[70] Here we have two distinct exceptions made to the general trust fund doctrine. In 1923 the court apparently forgets the trust fund theory, resting its decision upon the basis of public policy and requiring care to be used in the selection of servants.[71] Still later, the court in *Lincoln Memorial University v. Sutton*[72] states: "This court recognizes the so-called trust theory, and holds that in *ordinary*[73] cases a charitable corporation is not liable in tort for the negligence of its servants." What the ordinary case will be is difficult to ascertain. No reference is made in this decision to the doctrine of negligent selection. Whether in succeeding cases, the court will apply the strict trust fund doctrine, the doctrine of negligent selection, or create another exception to its already elastic rule, no one can say.

Other states which apparently apply the major premise of this group are Arkansas,[74] Arizona,[75] Mississippi,[76] Washington,[77] Wisconsin,[78] and Wyom-

62. *Ratcliffe v. Wesley Hospital and Nurses Training School* (1932) 135 Kans. 306, 10 P. 2d 859.

63. *Jackson v. Atlantic Goodwill Industries, Inc.* (1933) 46 Ga. App. 425, 167 S. E. 702. Also *Plant System Relief and Hosp. Dept. v. Dickerson* 118 Ga. 647, 45 S. E. 483; *Georgia Baptist Hospital v. Smith* (1927) 139 S. E. 101.

64. *Morton v. Savannah Hospital* (1918) 96 S. E. 887.

65. *Butler v. Berry School* (1921) 27 Ga. App. 560, 109 S. E. 544.

66. *Bazemore v. Savannah Hospital et al.* (1930) 171 Ga. 257, 155 S. E. 194.

67. *Abston v. Waldon Academy* (1907) 118 Tenn. 24, 102 S. W. 351.

68. See *McKay v. Morgan Memorial Co-op Industries and Stores, Inc.* (1930) 272 Mass. 121, 172 N. E. 68; *Reavey v. Guild of St. Agnes* (1933) 187 N. E. 557; *Winnemore v. Philadelphia* 18 Pa. Sup. 625.

69. *Gamble v. Vanderbilt University et al.* (1918) 138 Tenn. 616, 200 S. W. 510.

70. *Love v. Nashville Agricultural and Normal Institute* (1922) 146 Tenn. 550, 243 S. W. 304.

71. *Wallwork v. City of Nashville* (1923) 147 Tenn. 681, 251 S. W. 775. "It is now held, on grounds of public policy, that a private charitable hospital which has exercised ordinary care in the selection of its employees is not liable for injuries resulting from their negligence."

72. (1931) 163 Tenn. 298, 43 S. W. 2d 195.

73. Italics ours.

74. While no recent decisions have been found in this state, the oldest decision *Fordyce and McKee v. Woman's Christian National Library Association* (1906) 79 Ark. 550, 96 S. W. 155 apparently adopts the trust fund doctrine witout modification. Five years later in *Arkansas Midland Railroad Co. v. Pearson* (1911) 98 Ark. 399, 135 S. W. 917, the court apparently decides its first stand upon the question was too unequivocal and imposes the duty of exercising care in the selection of employees. Beneficiaries and third parties would seem to stand upon the same basis, although any reference in these decisions would seem to be mere obiter dicta.

75. This court, declaring that the question is one of first impression in Arizona goes into an extensive discussion of the American authority upon the question. Stating that the weight of authority exempts charities from liability, it discusses the reasons therefore under three headings: (1) Trust fund doctrine, (2) implied waiver, (3) public policy. Arizona casts its ballot into the third group. It holds directly that beneficiaries may recover only if negligence be shown in the selection of the offending servant. The case definitely classes pay patients as recipients of the charity. *Southern Methodist Hospital and Sanatorium of Tucson v. Wilson* (1935) 46 P. 2d 118. The question of strangers is not specifically dealt with but a careful reading of the case convinced the writer that the court would probably place them on the same basis as beneficiaries.

76. This state is another jurisdiction which has not passed squarely upon the question of the right of third parties to recover. The dicta of the decided cases is certainly broad enough to include all situations. See *Mississippi Baptist Hospital v. Moore* (1930) 156 Miss. 676, 126 So. 465; *James v. Yazoo and M. V. R. Co.* (1929) 153 Miss. 776, 121 So. 819; *Eastman Gardiner Co. v. Permenter* (1916) 111 Miss. 813, 72 So. 234; *Pace v. Methodist Hospital* (1930) 130 So. 468.

77. Pay patients and servants seem to be subjected to the same rules that govern the recovery of ordinary beneficiaries. *Richardson v. Carbon Hill Coal Co.* (1895) 10 Wash. 648, 39 P. 95; *Wells v. Ferry-Baker Lumber Co.* (1910) 57 Wash. 658 107 P. 869; *Wharton et ux v. Warner et al.* (1913) 75 Wash. 470, 135 P. 235; *Bise et ux v. St. Luke's Hospital* (1935) 43 P. 2d 4. In the case of *Tribble v. Missionary Sisters of the Sacred Heart* (1926) 137 Wash. 326, 242 P. 372 a verdict for plaintiff was sustained where negligence in the selection of the offending nurse was shown. The dicta of the cases is certainly sweeping enough to create the same holding as to strangers to the charity, and if the ordinary meaning of "patron" is used, the following case is decisive upon the question. *Thurman County Chapter American Red Cross v. Department of Labor and Industries of Washington* (1932) 166 Wash. 488, 7 P. 2d 577.

78. Wisconsin may belong in this group or in group 1, depending upon the interpretation given to the court's decision. In *Morrison v. Henke* (1915) 165 Wis. 166, 160 N. W. 173, a suit brought by a patient to recover damages, the court considered the question of incompetency of the servant and the failure of the charity to use due care in the selection and stated that it did not deem the evidence sufficient to send the case back for a trial upon that issue. The court thereby directly seems to apply the doctrine of negligent selection. In *Bachman v. Y. W. C. A.* (1922) 179 Wis. 178, 191 N. W. 751, the court

ing.[79] Wisconsin is in an extremely uncertain position as the court does not squarely pass upon the issue of negligent selection. Both Wisconsin and Wyoming seem to make a similar exception to the usual rule, in that they impose an absolute liability upon the charity where the injury is received as a result of improperly maintained premises.[80]

We have seen the application of different rules in a number of different groups of states. We should, at least, attempt to criticize these holdings constructively in order to see whether or not any of these adequately meets the needs of the present day. In the first place, it should be recognized that such doctrines as the inapplicability of *respondeat superior* and the trust fund doctrine are pure legal fictions. They are the offspring of the court's interpretation of public policy. They have no inherent magic of themselves. Rather than a reason for a certain decision, they are classifications of certain results. Some courts, failing to recognize this, have attempted to hedge a general result, such as the trust fund doctrine with modifications, not recognizing that this destroys the logical result that they have otherwise built up. The present tendency of capable professors, attorneys, and courts of law is to break through the legal fiction and rest the decisions upon the real ground from which the fiction, originally, in order to meet some special exigency, arose. In the question under discussion, the real and original basis is simply public policy. The wiser courts are, therefore, shattering the veils of fiction and deciding the question on the basis of public policy alone. We may hope within the next decade to see the abandonment of most of the fiction referred to. The interpretation of public policy may vary from state to state, and the mere fact that in interpreting public policy different results obtain in different jurisdictions does not mean that any of them is drastically inconsistent.

The trust fund doctrine, then, is really a conclusion of a particular court's interpretation of public policy. It argues, or rather, concludes that the founder of a charity could not foresee that there might be suits against the charity and would certainly not desire that his donation be cut into by the collection of damages. So the court feels that it is better public policy not to discourage these gifts to charities. But is the public policy of such states consistent? Take, for example, Illinois, one of the staunchest of the trust fund adherents. The University of Illinois is specifically, and a great many other charities, by implication, included in the state Workmen's Compensation act. The result is that Illinois, through its legislature, considers it bad public policy to exempt a charity from liability to servants, and, through its courts, considers it excellent public policy to exempt the charity from liability to total strangers. Such an inconsistent result when the same practical result—that of depletion of trust funds—obtains can be blamed partly on the maintenance of an archaic legal fiction.

The truth is that the founders of a charity can foresee that injuries will be suffered in the maintenance of his gift. We may say with the courts of Minnesota: "It is a trite saying that charity begins at home. It may reasonable be said that charitable institutions must first fairly compensate those who are injured and damaged by the negligence of their officers and servants in the conduct of the affairs of such institutions before going further afield to dispense charity and do good."[81] Of course the original tort-feasor is primarily liable. Usually, however, such tort-feasor is financially irresponsible and the injured person is left wholly without remedy. And if the act had occurred of defective premises or apparatus and not by the act of an employee, there could be no action whatsoever. The average well maintained charity now carries public liability insurance. In such contracts of most reliable insurance companies there is a clause which states that the carrier shall not avail itself of the defense of non-liability except with the full consent of the assured. This means that such defense is never resorted to, as a matter of policy, except where an unmerited claim is presented or excessive money damages demanded. If it is possible for such charities to insure against such acts when no liability exists, then it is also possible for them to insure if the same liability be imposed upon them as upon other organizations. The necessity of such insurance is foreseeable and the exact cost of it may be calculated by the intending donor. Such donor would be no more discouraged by this item of expense than by the item of wages, or light and heat, or similar costs. The theory of the trust fund doctrine becomes, therefore, no longer tenable.

As to the states which require only due care in the selection of servants, we must admit that such care is the only thing which any employer can do to prevent accidents. It cannot foresee every act of every servant. That phase of law finds a parallel in the liability of the owner of a dog. A dog, for example, is usually allowed one bite. But the employee is not. If in the ordinary business corporation liability is imposed by law for the negligent or malicious act of an employee in the course of his employment, then the same liability should be imposed upon the charity. If the principle of public policy is universally held that all business firms must answer for the employee's "first bite", then all charities should have that liability rather than that of the owner of the dog, or rather than no liability at all. The reasons for exemption which existed in the nineteenth century exist no more. They have passed on to that great land of dreams in law, the world of fiction. When courts realize this, then will law arrive nearer to the ideal of justice.

places third parties on the same basis as beneficiaries, and goes ahead to speak of the total exemption of charities on the basis of the inapplicability of the doctrine of *respondeat superior*. The court makes no mention of the issue of negligent selection, and the exemption would seem to be total, except for the fact that the court affirms the *Morrison* case, which seems to apply that rule. Since the later case omits the discussion of that issue, we cannot assume that it overrules the *Morrison* case to that extent. It should be remembered, however, that the court could almost as easily be placed in the same classification as Illinois as in this group now under discussion.

79. It is clearly the holding of Wyoming that the only duty of a charity toward a patient is to use care in the selection of servants and employees. *Williams v. Union Pacific R. Co.* (1912) 20 Wyo. 392. 124 P. 505; *Bishop Randall Hospital v. Hartley* (1916) 24 Wyo. 408, 160 P. 385. The dicta, with the exception made in the following note, seems sweeping enough to cover all situations and would thereby seem to place third parties in the same classification as beneficiaries.

80. See *Wilson v. Evangelical Lutheran Church* (1930) 202 Wis. 111, 230 N. W. 708 where the court imposes absolute liability because of a statute requiring all public buildings to be maintained in a safe condition. Wyoming seems to obtain the same result without a statute. (1925) 34 Wyo. 710, 241 P. 710. While this case has been interpreted by some to allow an absolute right of recovery to third persons such as invitees, the writer does not believe that it goes farther than its language directly indicates—that is, imposing a duty upon a charity to maintain premises in a safe condition.

81. See *Geiger v. Simpson Methodist-Episcopal Church* (1928) 174 Minn. 393, 219 N. W. 463.

WHAT MAY WE EXPECT FROM COMPARATIVE LAW?

Creative Use of Comparative Law in Our Formative Era Made by Kent and Story—Stabilizing Influence Exerted on Our Legal Development in the Fore Part of the Nineteenth Century—Reasons for Subsequent Decadence—Suggestions Which May Be Gotten for the Purposes of Today—Our Main Interest in Comparative Law Must Now Be in Finding Out How and How Far It May Be an Instrument of Making the Legal Order More Effective for Its Ends, etc.*

By Roscoe Pound
Dean of the Law School, Harvard University

WHEN Thomas Hood was asked whether life was worth living he replied, "That depends upon the liver." What we may expect from comparative law depends upon the comparative lawyer and the kind of thing he sets before us as comparative law. So at the outset we must ask what is comparative law and what not for the purposes of today. We must look into certain mistaken ideas of law and so of comparative law.

Few thing are more difficult than to turn a current of human thought out of a channel in which it first began to flow. The first type of legal precept was the rule of law—the precept attaching a definite detailed legal consequence to a definite detailed state of facts. Thus, the Laws of Hammurabi provide: "If a free man strike a free man, he shall pay ten shekels of silver." The Salic law provides: "If a man have called another a fox, let him pay ten shillings." The Roman Twelve Tables provide: "If the father sell the son three times, let the son be free from the father." Such definite detailed rules are an important element in the law ever after. But long after many other, and in many ways more significant, types of legal precept have been discovered and developed, men continue to think of law in terms of this earliest form.

Such a way of thinking about law was reinforced for modern law by a characteristic idea of the classical period of legal development in the modern world. Our science of law has its beginnings in the study of Roman law in the Italian universities of the twelfth century. Then and long after the university teachers of law thought of the Corpus Juris as made up of so many legislative texts enacted by the Emperor Justinian, each a separate rule of law like a section of a criminal code. When newer ideas of law became established in the seventeenth century and men looked for the ideal rather than for the authoritative law, they still thought of laws rather than of law. They sought a universal code of rules of law—of definite detailed legal precepts attaching fixed consequences to determined states of fact—a code to be discovered in all its details by reason. Comparative law began in this rationalist natural law channel. Under the influence of the idea of natural law, men looked for generations for the one right rule, dictated by universal reason and universally valid, on every detailed item of human conduct and human relations; seeking to find it by a sheer exercise of reason. The reason of the individual jurist was competent to this task in and of itself. But it was helpful to have suggestions from the reason of jurists and lawmakers of the past. The reason of the Roman jurist was regarded as specially helpful.

When the academic ideal of the continuity of the Roman empire into the medieval and thence into the modern world, and its corollary, the binding legislative authority of the Corpus Juris, broke down after the Reformation, the *de facto* universal authority of Justinian's law books, as the common law of Continental Europe, was explained by postulating Roman law as embodied reason; by assuming it to be in the main declaratory of the precepts of natural law. American text writers became infected with this idea in the formative era of our law through their reading of the seventeenth and eighteenth century continental treatises. To them comparative law was a search for the rule of natural law, as set forth authoritatively in the texts in which reason was embodied, in order to verify or criticize or correct the rule as found in the books of the common law.

Another type of comparative law grew up on the Continent in the last century as a result of the gradual divergence from each other of the codes drawn up on the model of the French Civil Code of 1804. A comparison of code provisions on particular points in different civil law countries, and of the divergent doctrinal and judicial interpretation and development of these provisions became a recognized form of juristic activity. This type of comparative law was given a new impetus for a time by the crop of original codes in other lands in the fore part of the present century.

But I am to speak of comparative law, not of comparison of rules of law; of comparative study of systems of law, not of mere comparison of rule with rule as between one system and others. For law is something more than an aggregate of laws.

It used to be told that some two generations ago one of our states enacted a somewhat ambitious liquor law. The bill was amended a bit casually in its progress to enactment, and, as it took final form, wound up with this section: "Justices of the Peace shall have jurisdiction under this chapter, and for each violation of any of the preceding sixteen sections may assess a fine of not less than five nor more than three hundred dollars and be imprisoned in the county jail not more than ninety days."

Undoubtedly, this was a law. No less clearly it was not law. It required law to make law out of it. Laws are rules, but law is far more than a body of rules. Laws are but raw materials of law. Law is needed to

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make laws instruments of justice. Rules are made in advance, sometimes to formulate experience, more usually on rationalist ideas of social advantage, not infrequently to meet the exigent self-interest of some vigorous, well organized, self-assertive group. Law arises from the application of these laws and the endeavor of judges and lawyers and law teachers to make of them a coherent system, operating according to an ideal and furthering justice. Principles, conceptions, doctrines, a received technique of finding the grounds of decision of cases and of advice to clients in the body of laws and in the principles, conceptions and doctrines built upon and around them, and a body of received ideals by which application of laws and development of rules are guided, are the work of courts and jurists and lawyers and constitute the law. A true comparative law calls for very much more than a comparison of the rules of law on this or that point in the Roman law, the modern Roman law, the several modern codes, and the Anglo-American common law.

Another type of comparative law, thought of as a comparison of laws, is comparative legislation; a comparative study of the way in which lawmakers in different parts of the world are meeting or are endeavoring to meet the problems of social legislation and of adjustment to economic unification and inter-dependence, which have become so general since the world war. A genuine comparative law might arise out of this. Unhappily, as it has been carried on thus far, consciously or unconsciously it postulates natural law of the old rationalist type. It tacitly assumes that for every detail of every legislative problem there is one right universal rule, which the lawmaker is seeking to discover and to formulate. One way for the reason of the lawmaker to detect it is to put the various human gropings for it in the lawmaking of the past and of the present side by side, by a paste pot and scissors method, and apply comparative reason. It is the converse method to that by which Dickens' editor wrote his editorial on Chinese metaphysics. The editor read in the Encyclopaedia Britannica on China and on Metaphysics and combined his information. The expert on comparative legislation combines the information afforded by the legislation of the world on any point you like and pulls out the one right rule.

Yet one must not disparage unduly comparative law as a mere comparison of laws or of rules of law. Rules of law are a necessary and highly important element in any body of authoritative legal materials. They cannot be too well considered or too well formulated. When a new jurisdiction is set up, almost over night, and has to be provided with an up to date body of law in a hurry, intelligent selection from along the rules of law which obtain elsewhere in the world may be an economical mode of procedure. Something of the sort happened in Japan at the end of the last century and was met by a true comparative law. Something of the sort happened in Latin America and comparison of code rules and doctrinal development of them helped meet it. Something of the sort happened also in many of the states of the United States in the days of our expansion and it was met in large part by comparison of laws and by comparative law.

Under the influence of the rationalist ideas derived from the eighteenth century, Kent and Story made creative use of comparative law in our formative era. On every side they compared the rules of the Roman law, or of the modern Roman law, with those of the common law. They showed, or seemed to show, that the Roman law or the civil law, assumed to be declaratory of reason, laid down rules substantially those which were to be found in the English decisions and English law books. Thus they assured the general reception which made us a country of forty-seven common law jurisdictions—forty-eight if one includes the District of Columbia—held together juristically, and in larger part legally, by a body of universal doctrines and by the universal technique of English law.

A conception of an ideal of comparative law as declaratory of natural law, made for stability in the formative era of American law and gave direction to its judicial development. We must not forget that reception of English law as the law of post-Revolutionary America was not a foregone conclusion, nor did it take place without some struggle. Law and laws were not popular in the time just after the Revolution. Many would have liked to put the administration of justice on a non-technical, non-legal basis of natural equity. Many who had to do officially or professionally with the adjustment of controversies sought to cover up their ignorance of law, and to palliate their lack of legal training, by calling for rejection of the effete and monarchical systems of law of the old world and demanding a setting up of a wholly new body of American law on the basis of the law of nature and ascertained directly and independently by our own reasons. Many would have rejected English law, which suffered from the odium then attaching to all things English, and would have received French law. Not the least of the means by which Kent and Story overcame these prejudices and made secure and permanent our reception of the English common law was a skilful use of comparative law. They strove to show and they made plausibly apparent the identity of an ideal form of the common-law rule on all the disputed points of the day with an ideal form of the rule to be found in the Roman texts or in the civilian treatises. Thus they seemed to have demonstrated the identity of each with a then universally believed in law of nature.

In the fore part of the nineteenth century comparative law was likewise a stabilizing influence in our legal development in that a universal commercial law, as set forth in the Continental treatises on that subject, was conceived to be declaratory of natural law. Those treatises, on which Kent and his brethren rely in every page of Johnson's Reports in the cases which shaped our formative law, are a medley of general commercial usage, modernized Roman law, and juristic consideration of what ought to be. They served to give form and stable content to American commercial law because they were at hand conveniently as something to which lawyers might turn with reasonable assurance both as the basis of advice and as the basis of argument.

Although comparative law had done notable service in the shaping of our formative law in the period before the Civil War, it lost its hold upon American law writers and courts and lawyers in the latter part of the nineteenth century. Where the writers of the earlier time had cited and quoted the civilians freely, making good use of the civilian texts in the development of their own views, the writers of a later time made no more than a few perfunctory references, either as deferring to an established fashion, or by way of a display of learning. The causes of this decadence of comparative law were, I suppose, four.

One was the insulation, as one might put it, of American law and Anglo American science of law after the classical era was past. In reaction from the natural-law thinking of our creative era, when we used comparative law, we were busied after the Civil War with

organizing and systematizing the results of the period of development. The English texts and English decisions, supplementing our own, sufficed for these purposes. Throughout the world, in the last half of the century, there was this same giving over and even disparagement of the universal conceptions and methods of the eighteenth century. A second reason is to be found in the rise and dominance of the historical jurists. They thought of law as something which grew and must grow up spontaneously in the life of a people. The life of a people impressed its spirit upon experience. Hence a people could not expect to make law. Nor could they borrow law or rules of law with any good results. Why, then, engage in a futile search for what other peoples had done? Nothing for practical purposes was to be achieved by comparison of the laws of one people with those of another. A third and no less effective cause was the vogue of analytical jurisprudence in the English-speaking world at the same time. The analytical jurist thought of law as a body of imperatives of the local sovereign. These imperatives gave us a "pure fact of law," with which alone the jurist had to do. The content of these imperatives was not his concern. Such things were for the legislator. Given the imperatives, the jurist could order and systematize and give logical coherence to them. But he did not need comparative law for this purpose. His analytical method was comparative in that he drew his universal anatomical scheme of law from the materials of the modern Roman law and of the common law. The lawyer and law writer, given the scheme of things legal in this way, could apply it to the pure facts of his local law with no more.

Most of all, however, the decadence of comparative law in nineteenth-century America is due to an exaggerated belief in the self-sufficiency of local law. Nationalism, in the form of faith in a local law existing of itself and for itself, took a strong hold upon the imagination of American lawyers of that time. For a season American jurisdictions took pride in anomalies of local legislation and local judicial decision as things to be cherished for their own sake. There was in many quarters a sort of cult of local law. Even now, when this worship of local anomalies has waned, its effects still embarrass us. For example, the Uniform Negotiable Instruments Law has been on our statute books now for more than a generation. It lays down detailed rules which have been adopted in identical language by the legislatures of the several states with the avowed purpose of making the law on this subject uniform throughout the United States. The need of such uniformity is manifest. The pressure from the business world to achieve and maintain uniformity in a matter of such urgent commercial interest is strong. Yet some courts have been so tenacious of the local anomalies which obtained before the statute, that in one way or another more than one of them has persisted in the teeth of legislation, obvious convenience, and the needs and desires of business men. Analytical jurisprudence is not the only explanation of such things. Nor are they solely attributable to the historical jurisprudence which looked upon legislation as declaratory and so would construe a uniform act as carrying on local anomalies it was meant to wipe out. An idea of the intrinsic validity and value of local law took deep root in professional thinking in the last century.

As, on the Continent, a comparative modern Roman law of civil-law countries grew up in the wake of the modern codes, in the United States a sort of comparative common law of the several states grew up in nineteenth century text writing, in a later stage in which the idea of rules declaratory of a universal natural law had given way to an idea of self-sufficient rules of the local law of each state resting on the sovereign law-making authority of that state. There was then little or no market for cyclopedias of local law, of which of late we have been getting too many. There were not enough lawyers buying books in any locality to furnish such a market. Lawyers had to have law books, but economic conditions of publishing demanded books which could have a wide sale over the country at large. Thus the law text book had to be so written that lawyers and judges everywhere could use it, or it could not find a publisher. A characteristic type of text book resulted. It assumed that a decision anywhere was authority everywhere unless the courts of some particular jurisdiction had laid down the law otherwise. It assumed that decisions and dicta in the whole common-law world, from the seventeenth century to the nineteenth, could be reduced to the form of definite detailed rules of law, on the model of a rule of our law of real property, and that these rules could be subjected to an analytical or historical or combined analytical and historical critique which would yield a universal American common law.

Text book digests, or digest text books of this type exerted a certain force for unity in the reign of local law. But their influence in this respect was relatively feeble. It was recognized that each state had its exceptions to or divergencies from many of the so-called rules of the common law. These were duly catalogued and set over against the "weight of authority," and such a contrast in no way operated as an urge to do away with the anomaly or exception or divergence. If we may call it comparative law, this sort of comparative law has done its work. We must look for something much more worth while for comparative law to do for tomorrow.

In spite of the intense political nationalism which has sprung up in the present century since the war, there has been a revival, in this generation, of the universal ideal of law. This ideal, dominant in the Middle Ages through the authority of the universal church and juristic acceptance of the academic postulate of a universal empire, was carried on in the seventeenth and eighteenth centuries by the law of nature school with its faith in a universal code of ideal rules. But the universal ideal was undermined at the Reformation and the legal nationalism which arose in its wake, along with the development of modern states and paramountcy of politically organized society, reached its full growth in the nineteenth century. Comparative law, and by this I mean more than a mere comparing of rules of law, is the most effective antidote to the idea of the worth of local laws simply as a local possession. It is an effective antidote to the idea that a sufficient number of such anomalies make up a significant local law. Thus comparative law is not the least of the forces in the law of today which are helping bring back the universal ideal to meet the needs of an economically unified world.

This is something. But more especially, in the formative era of American law, comparative law, if only in the old sense of a comparison of rules of law, had a liberalizing, a creative, but also a stabilizing influence. It is clear enough that we need some like liberalizing and creative influence in the law of the time. I feel strongly, too, that a directing and stabilizing influence is needed now as it was then. How far may we find something of these things in comparative law today?

As I said at the outset, much if not all depends on

what we mean by comparative law; upon what is compared and how it is compared. Let me assume that there will be a comparison of techniques and a comparison of ideals, as well as a comparison of legal precepts. Let me assume also that there will be more than an analytical doctrinal or dogmatic comparison. Let me assume there will be a functional comparison.

Let me hasten, also, to explain what I mean by a functional comparison. The functional approach in every connection is characteristic of the present day science of law. But when any term gets into vogue there is danger of using it perfunctorily, with no critical attention to its meaning in a particular context. It will be inferred at once that I think of a comparison of legal precepts with respect to how and how far they attain their ends and the ends of law in the time and place. The workings of legal precepts are now looked into as much as or more than their abstract content. But what I have in mind particularly is study of how the same thing may be brought about, the same problem may be met by one legal institution or doctrine or precept in one body of law and by another and quite different institution or doctrine or precept in another. Thus it is enlightening to perceive that what we do by means of constructive trust is done by the civilian by a tacit hypothecation, or, as we should say, implied pledge. It is enlightening to see the civilian deducing the implied will of the parties to transactions where we seek for what is fair in the relations thereby created. It is enlightening to see the problems of a plurality of parties to a contract treated from the analogy of a legacy where we treat it from the analogy of co-tenants of land.

In the Middle Ages in an era of authority men sought to attain justice through rules. In the seventeenth and eighteenth centuries, in an era of rationalism, they sought to bring about justice through reason. In the maturity of the competitive individualist economic order in the nineteenth century, they sought justice through metaphysically demonstrated and legally guaranteed rights whereby the fullest and freest self-assertion was to be assured to each man. Today men are seeking justice through legislation on a social utilitarian theory of bringing about a maximum of social advantage, assuming we know where it lies, or through administrative individualization, without rules, without regard to logical requirements, and regarding rights not as ends to be guarded but as means toward scarcely apprehended social ends. We may recognize that no one of these methods will attain justice in every case and for every purpose. Traditional rules, reason, a logically organized system of recognized and secured interests, creative thought harnessed to the work of law-making, and intuition and discretion operating through administrative hierarchies and tribunals have each contributed to the legal order. Each has possibilities for the legal order of today and of tomorrow. We are not to cast off any of them. Rather we must seek to know how and when and where to use them and it may be, to find how to supplement them by such new instruments of justice as we can discover. If the watchword of the Middle Ages was authority, the watchword of the seventeenth and eighteenth centuries was reason, and that of the nineteenth century was freedom given effect by rights, the watchword of today must be research.

Especially in matters of business law, in an age of economic unification, we may get suggestions here and there, as we have been able to do in the past, from study of the rules, principles, doctrines and institutions which obtain in other lands. The teaching of the nineteenth-century historical school that law and rules of law and legal institutions could not in the nature of things be taken over from one land to another is refuted by the adoption or adaptation of English company law in so many civil law countries. It is refuted by such phenomena as the adoption or adaptation of the French Civil Code in almost every part of the world, in Louisiana, Quebec, and Latin America no less than in Italy, Spain, Holland and Rumania. The success of the Japanese wholesale reception of the German Civil Code shows that we may easily exaggerate the need of a body of law growing out of local conditions and responding to local wants. A local law seems to be demanded chiefly for property in land, inheritance and succession, and family law. But even here the almost universal copying of Justinian's 118th Novel, made for the Eastern Roman Empire of the sixth century, in American Statutes of Distribution in the nineteenth century, as well as in nineteenth century codes generally, and the universal doctrines as to marriage which have come into all systems of modern law from the law of the medieval church, suggest caution in assuming that a workable solution of a legal problem anywhere at any time may not be workable universally.

In the United States, where the idea of a local law as a precious local possession had been strongest, five counter movements have been manifest toward a more universal ideal. These are (1) the doctrine of the Federal Courts as to independent judgment upon questions of general and commercial law, making the law uniform for those courts, however diverse it may be in the states in which they sit, (2) the work of the National Conference of Commissioners on Uniform State Laws, giving us uniform legislation in the way of codification of all the important branches of commercial law, (3) the restatement of American common law now going forward under the auspices of the American Law Institute, (4) the influence of National as contrasted with local law schools, becoming marked after 1890 and the general superseding of apprentice training of lawyers by training in schools on the lines and with the spirit of national schools, and (5) the revival of comparative law.

We can get something for the purposes of today from comparison of rules of law as we find them in different systems, chiefly in that such comparison teaches us to be slow in assuming that there is but one necessary and inevitable rule of law possible for one given state of facts. The natural law quest for the one ideal rule in the ideal code taught us to think in that way and, as Maitland puts it, taught law is tough law. We can get something from comparison of principles; from comparison of the authoritative starting points for legal reasoning in different bodies of law. Many of the principles in our law were shaped by analogies of feudal land law and deserve the philosophical scrutiny of their presuppositions which we are impelled to make when we compare them with the principles of the modern codes from which like problems are approached. Also many of the principles with which we are familiar in American law got their shape and content in the fore part of the nineteenth century as they were taken over by English and American text writers from the eighteenth-century civilians or early nineteenth-century Pandectists. It is sometimes good to compare them with the more matured views of the Continental jurists of today. We can get something from comparison of legal conceptions. They were abused in much the same way all over the world in the last century and are being abused in another sense all over the world today. But some of them respond to universal institutions of the economic

existence as is witnessed by Jitta's oft quoted remark that a sale is a sale whether in Amsterdam or in New York. Some of them show a remarkable vitality, pushing their way into systems of law where they were unknown because they respond to universal demands of human intercourse, as in the case of the English conception of a trust. Some of them, which have proved highly useful in other systems deserve to be taken over by us, as for instance, the great achievement of the Pandectists of the last century, the conception of a legal transaction. We can get much from comparison of legal standards, especially by comparison of modes of applying them—by comparing judicial with administrative methods of application in different lands.

We can get much more from comparisons of technique and from comparisons of received ideals.

Comparison of judicial and juristic techniques is the beginning of wisdom in comparative law. It is also a prerequisite of professional use in any one country of the law books of another. One has only to have seen highly trained students from Continental universities trying to use English and American law books, or intelligent American lawyers trying to use Continental or Latin American codes, to preceive how hopeless it is to seek the law of another land from its law books without mastery of the technique of that law. But I look for most, for the purposes of the immediate future, from a study of the ideal element in law, a study of the received ideals of American law, which, if it is to be what it should be, must be carried on comparatively. It must be comparative as to the received ideals of the past, in different stages of legal development, in comparison with those of yesterday and of today. It must be comparative as to the ideal element in different bodies of law in comparison with each other.

As I see it, the major task of the time is to be this study of the ideal element in law; the organizing, systematizing and criticizing of it as we have organized, systematized and criticized the precept element in the past century. As historical and analytical jurisprudence became comparative in the nineteenth century in order to do their work adequately upon the precept element in modern law, so I look forward to a comparative philosophical jurisprudence which shall be able the better to do the needed work upon the ideal element. I should like to think of comparative law, comparative legislation and comparative jurisprudence as parts of one subject.

Our interest in comparative law today must be in finding how and how far it may be an instrument of making the legal order more effective for its ends, of making the body of authoritative legal materials more efficacious for achieving justice, of making the judicial and administrative processes more efficient agencies of securing human demands. For a time we are seeking a creative science of law as we sought an ordering and systematizing one in the last century. What can comparative law contribute to such a science of law? What can it contribute to the armory of legislator and judge, and jurist, and practitioner which will enable them to do their work better?

Matthew Arnold used to say that one who knew only his Bible knew not his Bible. May we not say that one who knows only the laws of his own jurisdiction knows not the law of that jurisdiction. Perhaps from one standpoint we may not go so far. But quite as clearly we may from another. A time of transition, a time of creative lawmaking, a time of legislative and judicial and juristic experimentation, a time of novel theories as to what law is or of theories that there is no law—that there is only a process none too thoroughly concealed with a camouflage of technical development of the grounds of its operation from the authoritative materials—such a time demands a deeper and wider knowledge of the technique and of the materials of judicial and administrative determination than is called for in an era of stability and quiescence. In the latter minute and accurate information as to the legal precepts recognized and applied by the tribunals of the time and place could make a learned and effective lawyer. In the former those precepts are on trial. They are not thought of as finally established, but as subject to inquiry as to their force and validity. Hence one who merely knows them as they are in comparison with themselves, is likely to be found wanting.

Arrangements for Annual Meeting at Boston August 24 to 28, inc., 1936

HEADQUARTERS: STATLER HOTEL

Hotel accommodations, all with bath, are available as follows:

	Single for one person		Double (Dble. bed for two persons)		Twin beds for two persons		Parlor Suites
	$		$		$		$
Statler	3.50 to	8.00	5.00 to	10.00	6.00 to	12	14 to 22
Bellevue	3.00 to	5.00	4.50 to	7.00	5.00 to	7	12 to 20
Bradford	3.00 to	4.00	4.50 to	5.50	5.00 to	7	12
Brunswick	2.50 to	3.50	4.00 to	6.00	4.00 to	6	5 to 10
Copley Plaza	4.00 to	6.00	5.50 to	7.50	8.00 to	10	12 & up
Copley Square	3.00		4.50		4.50		6
Kenmore	3.50 to	4.00	5.00 to	5.50	5.00 to	7	8 to 12
Lenox	2.50 to	3.50	4.00 to	5.00	5.00 to	6	5 to 10
Lincolnshire	3.00 to	3.50	4.50 to	5.00	5.00 to	6	9 to 11
Manger.	2.00 to	3.00	3.50 to	4.50	4.50 to	5	
Parker House	3.00 to	5.00	4.50 to	6.00	6.00 to	8	10 to 12
Puritan	3.00 to	5.00	4.50 to	6.00	5.00 to	6	5 to 10
Ritz-Carlton	5.00 to	10.00	6.50 to	10.00	8.00 to	10	12 to 20
Sheraton	3.50 to	5.00	4.00 to	5.00	5.00 to	7	7 to 10
Somerset	3.00 to	5.00	5.00 to	6.00	5.00 to	8	10 to 12
Touraine	3.00 to	5.00	4.50 to	6.00	5.00 to	6	10
Vendome	3.00 to	4.00	4.50 to	5.50	6.00 to	7	8 & 9
Westminster	2.50 to	3.50	4.00 to	5.00	5.00 to	6	8 to 10

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

THE CENTER OF POPULATION OF LEGAL EDUCATION, 1870-1930

By Walter Crosby Eells
Professor of Education, Stanford University

THE *center of population* is defined by the United States Census Bureau as "the point upon which the United States would balance, if it were a rigid plane without weight and the population distributed thereon, each individual being assumed to have equal weight and to exert an influence on the central point proportional to his distance from the point." In other words it is the center of gravity of the weighted plane or a two-dimensional average of the population.

The determination of this point at the regular decennial census intervals is the best method that has been devised by the United States Census Bureau to trace compactly the rate and direction of general movements of population. The first official computation of this point was made under the direction of Francis A. Walker, superintendent of the ninth census, for publication in the first statistical atlas of the United States, published in 1874.[1] At that time the position of the center of population was computed for each census year since 1790.

So convinced has the census bureau become of the value of this mode of summarizing population trends that in later years it has made much more extensive use of the same method. In 1910 the positions of the centers of population since 1880 for each state were computed. In 1920 the method was further extended to include centers of foreign-born population, of Negro population, of urban and rural population, and even to determine centers of agriculture, of manufacturing, of number of farms, of farm area, of improved acreage, of value of farm property, and of the production of corn, wheat, oats, and cotton.[2]

Why not then educational centers of population as well? A method which has proved so valuable in summarizing movements of general population should be equally valuable in summarizing the similar movements of the higher educational population—the student enrollment in the colleges, universities, and professional schools of the United States.[3] The object of this paper is to report and discuss the results of computations which have been made by the author to determine the *center of population of legal education* for each census year from 1870 to 1930.

Method of Computation

The data upon which the computations are based were taken from the official reports of the United States Office (formerly Bureau) of Education.[4] These statistics are not perfect, but they probably are as accurate and reliable as are available. The method used was the same as that of the census bureau, with the substitution of "states" (With their centers of population as computed by the census bureau) for "square

1. Walker, Francis A. (Compiler), "Statistical Atlas of the United States, Based on the Results of the Ninth Census." Washington, 1874: p. 5. For an earlier unofficial computation and other information regarding history of the center of population see Eells, Walter Crosby, "The Center of Population—a Prophecy and its Fulfillment," in *The Scientific Monthly*, XX: 78-84, January, 1925.

2. Sloane, Charles S. (Compiler), "Center of Population and Median Lines and Centers of Area, Agriculture, Manufactures and Cotton." (Fourteenth Census of the United States, 1920.) Washington, 1923, pp. 12-41.

3. For three such studies, see Walter Crosby Eells, "The Center of Population of Higher Education," *School and Society* (September 11, 1926), XXIV, 339-44; "The Center of Population of Engineering Education, 1900-1930," *Journal of Engineering Education* (June, 1935), XXV, 662-69; "The Center of Population of Pharmaceutical Education, 1870-1930," *Journal of the American Pharmaceutical Association* (October, 1935), XXIV, 868-71.

4. Reports of the Commissioner of Education: 1870, p. 521; 1880, p. cl; 1889-90, p. 1026; 1899-1900, II, p. 1968; 1910, II, p. 1034; Biennial Survey of Education, 1918-1920 (*Bulletin*, 1923, No. 29), p. 294; and Biennial Survey of Education, 1928-1930 (*Bulletin*, 1931, No. 20), p. 349-50.

TABLE I. LOCATION OF CENTERS OF POPULATION OF LEGAL EDUCATION, 1870-1930.

Year	Latitude North		Longitude West		State	County	Distance from Important Cities or Towns
1870	40°	40′	79°	58′	Pennsylvania	Allegheny	16 miles N. of Pittsburgh, C. S.
1880	40	27	83	23	Ohio	Union	20 miles NW. of Delaware 15 miles N. of Marysville, C. S.
1890	40	19	82	39	Ohio	Knox	39 miles NE. of Columbus 10 miles SW. of Mt. Vernon, C. S.
1900	40	40	83	40	Ohio	Hardin	23 miles E. of Lima 3 miles NW. of Kenton, C. S.
1910	40	17	85	19	Indiana	Delaware	26 miles SE. of Marion 7 miles NE. of Muncie, C. S.
1920	39	55	84	35	Ohio	Preble	23 miles NW. of Dayton 12 miles NE. of Eaton, C. S.
1930	40	22	83	44	Ohio	Logan	35 miles W. of Delaware 2 miles E. of Bellefontaine, C. S.

degrees" as the unit of computation.[5] The number of students of law involved at each census period is as follows:

1870, 1,657; 1880, 3,134; 1890, 4,518; 1900, 12,516; 1910, 19,447; 1920, 20,992; 1930, 41,426.

It is noteworthy, although not directly pertinent to this study, to observe that the number of law students almost doubled between 1920 and 1930 and that the number in 1930 was more than three times as great as it was at the opening of the century.

Location of Centers

The latitude and longitude and approximate location of the center of legal education for the seven different decennial periods since 1870 are shown in Table I and on the map of Fig. 1. The map also shows the location of the general center of population of the country for the same dates. The abbreviation "C.S." in Table I indicates that the town named is the county seat of the county in which the given center is located.

The center of population of legal education, rather surprisingly, has moved westward three decades, eastward three decades. The westward movements have been greater than the eastward movements, however, so that it has shifted during the past sixty years from western Pennsylvania to Western Ohio. The most surprising feature is its large movements eastward since 1910, from Indiana well back toward central Ohio. The total westward movement from 1870 to 1930 has been almost two hundred miles, but the net southern movement in the same period has been less than eighteen miles. The movement of the center of legal education in miles each decade is summarized in Table II.

TABLE II. MOVEMENT OF CENTER OF POPULATION OF LEGAL EDUCATION, 1870-1930.

(In miles during the preceding decade.)

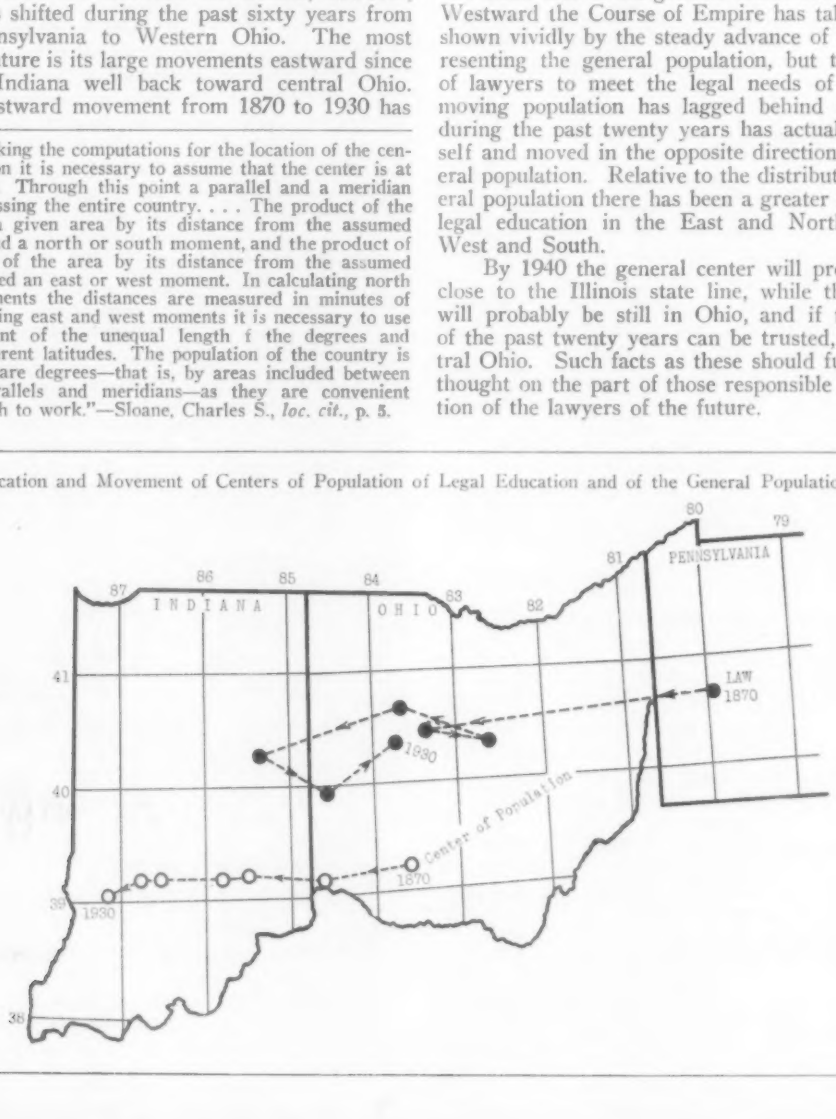
Year	From point to point in a straight line	Northward	Southward	Eastward	Westward
1880	180.5	...	13.7	...	180.0
1890	39.3	...	7.5	38.6	...
1900	57.4	20.5	...	...	53.6
1910	89.8	...	22.8	...	86.9
1920	44.5	...	21.7	38.9	...
1930	52.7	27.3	...	45.1	...
TOTALS (Net)			17.9		197.9

Reference to the map of Fig. 1, shows that the center of population of legal education has always been markedly north and east of the center of general population of the country. In 1930 the legal center was east even of the position of the general center fifty years earlier in 1880. In 1930 it was 90 miles north and 181 miles east of the general center for the same year. Westward the Course of Empire has taken its way, as shown vividly by the steady advance of the points representing the general population, but the preparation of lawyers to meet the legal needs of the westward moving population has lagged behind markedly, and during the past twenty years has actually reversed itself and moved in the opposite direction from the general population. Relative to the distribution of the general population there has been a greater emphasis upon legal education in the East and North than in the West and South.

By 1940 the general center will probably be very close to the Illinois state line, while the legal center will probably be still in Ohio, and if the indications of the past twenty years can be trusted, well into central Ohio. Such facts as these should furnish food for thought on the part of those responsible for the education of the lawyers of the future.

5. "In making the computations for the location of the center of population it is necessary to assume that the center is at a certain point. Through this point a parallel and a meridian are drawn, crossing the entire country. . . . The product of the population of a given area by its distance from the assumed parallel is called a north or south moment, and the product of the population of the area by its distance from the assumed meridian is called an east or west moment. In calculating north and south moments the distances are measured in minutes of arc; in calculating east and west moments it is necessary to use miles on account of the unequal length of the degrees and minutes in different latitudes. The population of the country is grouped by square degrees—that is, by areas included between consecutive parallels and meridians—as they are convenient units with which to work."—Sloane, Charles S., *loc. cit.*, p. 5.

Fig. I. Location and Movement of Centers of Population of Legal Education and of the General Population, 1870-1930



CONSTITUTIONAL QUESTIONS RAISED BY THE AGRICULTURAL ADJUSTMENT ACT

As Shown in the Briefs Filed in the Case of the United States of America, Petitioner v. William M. Butler et Al., Receivers of Hoosac Mills Corporation, Respondents—Extracts Presented to Serve as a Background for the Forthcoming Decision of the Supreme Court

ARGUMENTS were had in the important case of United States of America, Petitioner, v. William M. Butler, et al, Receivers of Hoosac Mills Corporation, before the United States Supreme Court on Dec. 10 and 11. A decision is expected some time in January. The following extracts from the able briefs filed on both sides and by the Amicus Curiae are presented with the object of affording the Bar a background for the forthcoming decision.

The case arose in connection with the receivership proceedings of this corporation. The United States sued to recover for the unpaid balance of processing and floor stock taxes alleged to be due under the Agricultural Adjustment Act for the period from August 1, 1933, to October 7, 1933.

The receivers reported that this claim should be disallowed. The District Court found for the Government. On appeal the Circuit Court for the First Circuit reversed the decision "primarily on the ground that the Act, in violation of the Constitution, delegated the legislative power to tax to the executive branch of the Government, and secondarily on the ground that in the guise of a tax the Act purports to control production of agricultural commodities in violation of the Tenth Amendment to the Constitution. The Court did not pass on the questions as to whether the processing and floor stock taxes are excises and not direct taxes, whether they are uniform, whether they violate the Fifth Amendment to the Constitution, and whether they are levied for the general welfare of the United States, for a public purpose and not a private one, all of which questions were argued orally to the Court and discussed in the briefs presented to it."[1]

The Government's brief sets forth the following specifications of errors, and continues with a summary of the argument.

SPECIFICATIONS OF ERRORS TO BE URGED[2]

"The Circuit Court of Appeals erred:

"(1) In holding that Congress improperly delegated to the Executive, with respect to the processing and floor-stocks taxes, the power granted to it by Article I, Section 8, Clause 1, of the Constitution.

(2) In holding that the processing and floor-stocks taxes constitute an exercise of powers, reserved to the States, in violation of the Tenth Amendment to the Constitution.

"(3) In reversing the decree of the District Court.

"The Government also urges that the Circuit Court of Appeals further erred:

"(4) In failing to hold that the processing and floor-stocks taxes are excises and not direct taxes.

"(5) In failing to hold that the processing and floor-stocks taxes are uniform throughout the United States.

"(6) In failing to hold that the processing and floor-stocks taxes are not violative of the Fifth Amendment to the Constitution.

"(7) In failing to hold that the processing and floor-stocks taxes are levied for the general welfare of the United States, for a public and not a private purpose.

"(8) In failing to hold that the respondents are not in a position to object to the expenditure of funds appropriated by Congress from the Treasury for the purposes of the Agricultural Adjustment Act.

"(9) In failing to hold that the processing and floor-stocks tax provisions of the Agricultural Adjustment Act constitute a valid exercise of the taxing power of Congress under the Constitution.

"(10) In failing to hold that the processing and floor-stocks taxes are levied pursuant to powers granted to Congress by the Constitution.

"(11) In failing to hold that the claim of the United States for cotton processing and floor-stocks taxes under the Agricultural Adjustment Act was a valid claim and in failing to order that such claim should be allowed and paid.

SUMMARY OF ARGUMENT[3]

"These taxes are levied under the power granted to Congress by the Constitution to lay and collect taxes. We first consider the taxes separately from any questions as to the use by Congress of the revenue to be derived from them."

"The Act in this respect is purely a revenue measure, its only purpose and function being to raise money. The processing tax is an excise upon a particular use of a commodity. The floor-stocks tax adjustment, considered separately, is a levy on the holding of manufactured goods for a particular purpose, a type of imposition already held to be an excise by this Court. This adjustment may also be sustained as a measure in aid of, and necessary to, the effective administration of the processing tax, for without these provisions widespread avoidance of the processing tax would have been possible, causing grave dislocation of business and marketing conditions. Both the processing and floor-stocks taxes operate uniformly throughout the United States. In selecting subjects for taxation, Congress is not confined to those which exist uniformly in every State.

"There is no delegation of legislative authority with respect to the rate of the tax. Congress provided a fixed mathematical formula which fixes the rate: the difference between the current average farm price and the fair exchange value of the commodity. The fair exchange value is defined as the price for a commodity that will give it the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in the Act. Determination of the current average farm price and the fair

1. Brief for Petitioner, pp. 7 and 8.
2. Idem, p. 8.
3. Brief for Petitioner, pp. 9-18.

exchange value is to be from 'available statistics of the Department of Agriculture.' Statistics showing the current average farm price of commodities and the prices paid by farmers for articles they buy had been collected and tabulated according to an established procedure and regularly published by the Department of Agriculture for many years prior to the passage of the Act. Congress was familiar with these statistics and the procedure used in collecting them. Consequently, Congress' direction to compute the rate by applying the above formula to these statistics constituted a direct legislative determination of the rate of the tax. The Secretary is directed to reapply the formula whenever new price levels have been reached.

"In the only circumstance in which a rate different from that fixed under the prescribed formula is called for, an appropriate standard is laid down for determining such rate. The circumstance is where the Secretary finds, after notice and opportunity for hearing, that the tax at the rate prescribed by the formula will cause such reduction in the quantity of the commodity domestically consumed as to result in the accumulation of surplus stocks of the commodity or in the depression of the farm price. Upon the finding of this fact, the Secretary may lower the tax to such a rate as will prevent the decrease in consumption. The Secretary is authorized only to lower the rate fixed under the formula—not to increase that rate. There is no improper delegation of legislative power in this provision. Moreover, this provision and that directing the reapplication of the formula are separable and have never been used with regard to the tax here in issue, so that the question of the validity of these provisions is academic.

"Objections to the Act based upon the principle of separation of powers seem to rest primarily on the argument that the Secretary of Agriculture may impose the taxes whenever he sees fit. We contend that, on the contrary, the event which starts the tax is controlled by definite standards provided by Congress. The Secretary is given power to initiate reduction programs 'in order to effectuate the declared policy.' This policy provides a standard which calls only for determination as to whether the goal of given price levels have already been reached, or will be reached in the immediate future without reduction, whether the factors which determine farm price are such that a given reduction of production will raise the price, and whether reduction can be accomplished by voluntary methods. These matters are capable of factual determination, and the Act requires or forbids the Secretary to initiate a reduction program according to the result of these determinations.

"Furthermore, respondents fail to distinguish between discretion given the Secretary in the spending of money and discretion given him in making the taxes effective. The taxes become effective upon any one of a limited number of commodities named by Congress, when the Secretary determines, and so proclaims, that rental and benefit payments with regard to such commodity should be made. This decision relates solely to the spending of money, an executive function, as to which there can arise no question of delegation of legislative power. In the making of this decision, consideration as to the time the tax is to commence is not relevant and would be improper. Congress has conditioned the commencement of the tax upon the happening of an event which occurs, without regard to the tax, during the lawful discharge of a public office.

"In any event, the issue concerning improper delegation of legislative power is immaterial, because Congress has expressly ratified the assessment and collection of these taxes. By this ratification Congress has made unquestionable the exercise of its own discretion and has specifically determined itself that the taxes at the rate and upon the subjects here involved were proper and advisable. The limitation upon the right of Congress to delegate is that Congress may not abdicate its essential function of determining matters of policy. If there were any abdication here in the first instance, that abdication was cured when Congress determined the matters of policy by the ratification. Congress has not attempted to ratify acts which it could not have authorized. The acts ratified are the assessment and collection of taxes at specific rates on specific commodities. This Congress could have authorized and directed in the first instance.

"The taxes imposed on respondents do not violate the Fifth Amendment. Clearly the taxing provisions of the Act have a reasonable relation to the raising of revenue. There is nothing arbitrary or capricious in levying a tax measured by the amount of a basic commodity processed by the taxpayer. Contention that the Fifth Amendment is violated because the taxes are not for a public purpose is based, not on the character and effect of the tax, but on the argument that money will be taken from the Treasury and devoted to uses not within the powers of Congress.

"This argument, we submit, is the basic proposition upon which rest most of the contentions against the validity of the taxes. In answer to it, we urge, first, that respondents should not be allowed to defeat their otherwise valid taxes by challenging the appropriation contained in the Agricultural Adjustment Act. The actual use to which respondents' money will be put is indeterminable. Where the appropriation and the taxes were contained in separate Acts this Court has refused to allow the appropriation to be questioned. As a matter of public policy, no different rule should apply where the taxes and the appropriation are contained in the same Act, especially where, as here, the appropriation itself leaves uncertain the eventual disposition of the money.

"Further, we submit that if the appropriation in the Act be considered, the taxes are nonetheless an exercise of the power given to Congress by Article I, Section 8, Clause 1 of the Constitution—to lay taxes to provide for the general welfare. The general welfare clause should be construed broadly to permit the levying of taxes to raise revenue for any purpose conducive to the national welfare. It is not limited by the subsequently enumerated powers. This is shown by the plain language employed; by settled rules of constitutional construction; by the circumstances surrounding the adoption of the clause in the constitutional and ratifying conventions; by the views of those who played a principal part in the adoption and early application of the Constitution; by the opinions of later constitutional authorities; by the continuous construction given the clause by the legislative and executive branches; and by the decisions of this Court and the inferior courts. Many of our most familiar and significant policies and institutions are based on this literal interpretation of the clause. The adoption at this late day of the narrower construction would result in grave dislocations and would measurably retard the advancement of public health, education, the sciences, and social welfare.

"Moreover, as shown by the structure of our Government and the views of those creating it, the determination of what is for the general welfare, being a question of policy, is primarily for Congress to decide. This

Court will not substitute its judgment for the judgment of Congress on that question.

"The circumstances which called forth this legislation and the ends it was designed to accomplish can leave no doubt that there was ample reason for the determination by Congress that these taxes were levied to promote the welfare of the Nation. The entire Nation was suffering from increasing economic disintegration evident in every phase of activity. The shrinkage of rural buying power had dried up the flow of industrial products from cities to country. Previous governmental efforts to support farm prices and income had failed because of continued farm production in excess of consumption. Foreign markets for farm products had been sharply narrowed, as had been the domestic demand therefor. Record surplus stocks of basic commodities resulted and depressed farm prices far below other prices. The situation was due to causes beyond the control of farmers, and was not correcting itself. Efforts by individual States to control production (in the case of cotton) in order to reduce burdensome surpluses also had failed. It was entirely reasonable to assume that Federal efforts to aid farmers to balance production and consumption and to reduce the price-depressing farm surpluses would result in a marked increase in rural buying power and material economic improvement among the rural population, forty-four percent of the Nation's citizens. Furthermore, the known economic interdependence between agriculture and industry is so close as to make it reasonable to expect that a revival of farm buying power would be reflected broadly in other industries through the direct and indirect effects of renewed rural spending; that incomes of industrial workers would rise faster than living costs would advance; and that improved prices and increasing farm income would be followed by expanding industrial activity and improved credit, financial and trade conditions, and increased employment, as had been true in the past. These expectations of general benefit to the entire Nation have been verified by subsequent results. It is clear, then, that the Agricultural Adjustment Act was an exercise of the power given Congress to levy taxes for the general welfare.

"And since the taxes were imposed to provide for the general welfare, they also satisfy the requirement of public purpose, as it is inconceivable that a tax should be for the general or national welfare and at the same time not be for a public purpose.

"The Act may also be sustained as an exercise of the fiscal powers of Congress. The sudden decrease in the amount of farm income, added to the long period of price decline and general liquidation which had characterized agriculture during the preceding decade, had brought the agricultural credit structure to the verge of collapse. Not only the commercial institutions, such as banks and insurance companies, but also the Federal fiscal agencies, which Congress had established, were endangered, and their proper functioning was impossible. Having for its purpose the restoration of farm income, and thereby the reestablishment of the value of the agricultural assets underlying the financial system, the Act was reasonably designed to protect the fiscal agencies of the Government and to restore and maintain the credit necessary to the economic life of the country.

"There is no attempt here by Congress to exercise, contrary to the Tenth Amendment, powers reserved to the States or to the People. The provisions here challenged authorize only the collection and expenditure of revenue. No rules are prescribed by which agriculture is to be governed. The control of the States or the People over local affairs is not destroyed or interfered with; the operation of State laws has not been superseded; nothing is to be done without voluntary consent. Even if there were interference, however, it would be unobjectionable under the Tenth Amendment, because the interference would be a necessary and unavoidable result of the exercise by Congress of powers given it by the Constitution."

CONTENTIONS OF RESPONDENTS

The brief for the Receivers for the Hoosac Mills Corporation, Respondents, sets out their contentions in general form as follows:[4]

"1. That the enactment of the Agricultural Adjustment Act is an attempt on the part of Congress to regulate the local production of agricultural commodities and the prices to be paid by manufacturers and that the processing and floor stocks tax provisions of the Act have no other purpose than to finance this regulatory scheme.

"2. That the regulation of local agricultural production and prices to be paid by manufacturers is not within the scope of the powers granted to Congress by the Constitution either in the commerce clause or elsewhere; and that, if such regulation is a proper governmental function at all, it is one that is reserved to the states or to the people by the Tenth Amendment.

"3. That where, as here, an exaction, although styled a tax, appears upon the face of the statute to be nothing but an integral part of an unconstitutional scheme to control production, the levy is not an exercise of the taxing power of Congress, and refusal to pay it is the citizen's constitutional right.

"4. That even if the processing and floor stocks tax provisions can be considered as an exercise of the taxing power, it is such an exercise as is prohibited by the Fifth Amendment, because the raising of money for the benefit of selected agriculturalists is not taxation for a public purpose; because the taking of processor's money in order to benefit the producer is nothing less than confiscation of the property of one class for the economic advantage of another; and because the measure of the tax is unreasonable and capricious.

"5. That (apart from every other consideration) the floor stocks tax provision of the statute is invalid because either the tax is a direct tax that is void for lack of apportionment or, if an excise, is an unfair and unjust retroactive excise not levied to produce revenue and unlimited as respects the period during which it accrues.

"6. That even if Congress had the power to lay the taxes in question, that power was a power in trust the exercise of which could not be delegated; and that the scope and nature of the taxing function devolved by the statute upon the Secretary of Agriculture amounted to such attempted delegation and was ineffective to give to his exactions the quality of taxes laid by Congress. Similarly the production control scheme, if it is within the powers of the United States, is a legislative function, but it is likewise left entirely to the discretion of the Secretary of Agriculture.

"7. That the amendment of August 24, 1935 was ineffective to validate the prior exactions of the Secretary of Agriculture because Congress, being in the first instance without power to appoint him an agent to levy a tax, was without power to ratify the exaction which, without authority, he had attempted to make. As a matter of principle, it would be subversive of our form

4. Brief for Respondents, pp. 8, 9, 10.

of government to countenance the drastic, illegal and unauthorized acts of the Secretary of Agriculture.

"8. That the Amendment of August 24, 1935 discloses no intention to lay a retroactive tax; but even had such been the intention of Congress, the tax so laid would have been either an unapportioned direct tax or, if an excise, such an unreasonable exercise of retroactive power as is prohibited by the Fifth Amendment.

"Before supporting these propositions by argument the court will perhaps permit four general observations:[5]

"The first is that, underlying the Agricultural Adjustment Act and its companion statute the National Industrial Recovery Act, the respondents detect an insidious effort to transform the Congress of the United States from a federal legislature with limited powers into a national parliament subject, as respects control over both industry and agriculture, to no restraint except self-restraint. We submit that such a transformation cannot properly be accomplished by legislative action and judicial approval. If it is to take place, it must be accomplished by the people through the deliberate process of constitutional amendment.

"The second observation is that whatever of strength there is in the petitioner's argument depends upon ability to persuade the Court to ignore altogether the existence of the scheme of production-control, to disregard the specified purpose for which it is proposed to take money out of the citizen's pocket and to focus attention upon two points only, first, that the statute levies a tax and, second, that the citizen has no standing to question an appropriation. The respondents are confident that the Court will think realistically as did the Circuit Court of Appeals for the First Circuit, and will not accord to these exactions the quality of taxes if in fact the statute discloses them as having no such character. The respondents are likewise confident that the Court will decline to force a citizen to pay out his money under an unconstitutional scheme merely because, if he had already parted with it, he might not have a standing to control the Sovereign's use of it.

"The third general observation is that the respondents deem it to be unnecessary to answer in detail the lengthy argument in the petitioner's brief based on the "general welfare" provision in article I, sec. 8, Cl. 1, of the Constitution. Whatever may be the effect of the 'general welfare' clause under the taxing power, it seems clear to us that it cannot possibly include a power to control through the use of tax money the conduct and activities of citizens in spheres otherwise beyond congressional control. To argue that Congress cannot indeed regulate production by laying down rules of conduct and prescribing penalties for their violation, but that it may purchase control of production by laying taxes for that very purpose and by spending whatever is necessary to induce the producer to sell his birthright, is to make an assertion without a basis in reason or morals. We feel confident that no amount of argumentation based upon conflicting opinions expressed in the past will convince the Court that the federal government differs from the accepted concept of a government of limited powers. If, however, the Court is disposed to consider the welfare clause with more particularity, we beg leave to refer to the brief filed on behalf of the National Association of Cotton Manufacturers, in which with learning and cogency Mr. Donald, as amicus curiae, examines the history of the provision and gives convincing reasons in opposition to the contention which the petitioner bases upon it.

"The fourth observation is that this Act, as conceived and administered, is not an emergency measure. The Act does not aim to give temporary relief or restore the *status quo ante*. Its aim is to resurrect by force of law an arbitrarily chosen assumed millenium defined as the condition existing some twenty years ago. There are provisions for adjusting the scheme to changes in economic conditions as they occur in the course of time. For over two years the enforcement of this measure has continued without any suggestion that its policies were to be changed or withdrawn. Only recently, the Chief Executive, charged with the general supervision and approval of the administration of this Act, in whose hands is the power to terminate it, has openly declared that this agricultural control program is a part of the permanent policy of his administration. Aside from the facts, it has been repeatedly asserted in cases decided within recent months that extraordinary conditions do not create or enlarge constitutional power.

"With these preliminary observations, we beg leave to discuss the several propositions above submitted."

Inasmuch as the Respondent's brief does not contain a complete summary of the argument, like that of the Petitioner, the following short digest of its material may help complete the other side of the case.

The Act is not a revenue measure. The terms of the statute show plainly that its purpose is "to fix prices by controlling production." The driving economic purpose of the Act and the function of the tax rate in this economic purpose are vividly focused in Section 15 (b) and (d). The measure is an attempt to create an artificial economic situation by use of the proceeds of processing and floor stocks taxes, such that farmers will be driven to accept the program of the Department of Agriculture, by the knowledge that they will suffer in competition if they do not. At the same time, through the amount of the tax rate, it is intended to create a complementary artificial economic condition such that no purchaser may acquire certain commodities except by paying a price which in the judgment of the Department is equivalent in purchasing power to the prices in existence in an arbitrarily chosen period in history. Such a goal is vastly different from any legislation theretofore attempted.

Price fixing and control, to the extent that it is a governmental function, are reserved to the States or to the people. Congress has in fact made appropriations for the betterment of agricultural conditions, but such appropriations all involved simply the extension of financial aid. It has never heretofore been asserted by Congress or by any responsible authority that in consideration of financial aid, it might exact from the farmer an agreement to subject himself to a scheme of federal control actually or potentially inconsistent with the policy of his State with respect to production. If the contention is accepted here, there is no sound reason why control over industry may not be purchased as effectively as control over agriculture. By the use of federal money, Congress could in practice effectually nullify all the decisions of this court which have protected the areas reserved to the States by the Tenth Amendment. The argument that there is something voluntary about the crop production program which removes it from the limitations of the federal government is unsound. No valid distinction arises from the fact that in this Act the control of individual activities

5. Brief for Respondents, pp. 10, 11, 12.

within the State is accomplished by purchase instead of penalty.

The Act attempts an illegal delegation of legislative power, with regard to the initiation of the tax, the determination of the commodities taxed, the fixing of the tax rate, and the termination of the tax. There is no "complete, workable and intelligible direction prescribing what is to be done before it is turned over to the administrative branch for executive action." The nature of the Secretary's decision to initiate benefit payments, at the same time by specific provisions of the Act initiating a processing tax, is not changed by spelling out his single act of decision, as, first, a mathematical computation; second, a determination as an executive to spend money in part available in the Treasury, but chiefly to be raised by taxes resulting from his determination; and, third, the incidence of a tax by operation of law, a tax which goes into being only when he makes his decision to spend it. As for the amendment, it can in no event do more than cure an unlawful delegation of legislative power. It cannot cure or supply the entire lack of power. The invalidity of the Act is not predicated alone on this unlawful delegation of legislative power. The Act is in violation of the Tenth Amendment, not within any of the powers delegated to Congress, and the tax is an exaction condemned by the Fifth Amendment. These infirmities would invalidate the Act even if Congress itself had specifically levied the taxes in the first instance.

But even assuming that the Act and taxes are within the granted powers, still Congress is and should be totally without power to ratify taxes imposed by the Secretary of Agriculture under an invalid delegation of its powers. Congress is not a principal, but is itself the agent of the people. Congress does not hold a general power of attorney, but has only those powers delegated to it by the Constitution. These powers, at least so far as they are legislative powers, can be exercised only by Congress itself. In the present instance, the situation of Congress is not that of a principal, or even of an agent with power to delegate authority to subagents. It is closely analogous to that of an agent, who, because of his peculiar fitness to perform the task entrusted to him, is specifically denied the privilege of appointing another to act for him. The conclusion must follow that Congress, having no power to make the delegation in the first instance, cannot by ratification bind as principal, decisions made by one whom the principal had in advance specifically excluded.

The processing and floor stocks taxes violate the Fifth amendment; the Act takes from one class without compensation and gives to another; the taxes are not raised for a public as distinguished from a private purpose; and they are arbitrary and unreasonable. The floor stocks taxes are a direct tax and are void because not apportioned. If they are an excise, they are invalid because retroactive, extending for an unreasonable period into the past.

It is deemed unnecessary to answer the lengthy argument in the petitioner's brief based on the "General Welfare" provision, since it could not possibly include a power to control through the use of tax money the conduct and activities of citizens in spheres otherwise beyond Congressional control. If, however, the Court is disposed to consider the Welfare Clause with more particularity, it is referred to the brief filed as amicus curiae, on behalf of the National Association of Cotton Manufacturers, by Mr. Malcolm Donald.

Mr. Donald's brief upholds the Madisonian view that the General Welfare Clause is limited to the subsequently enumerated powers, but argues that even under the Hamiltonian theory, the Government's contention must fail. The discussion of this important point, both in the brief of the petitioner and that filed by Mr. Donald as amicus curiae, is learned, exhaustive and absorbingly interesting. It really constitutes a great debate and should in some way be made available in full to the Bar. Mr. Donald's brief further denies that the Act can be sustained as an appropriate exercise of the fiscal power of the government and discusses other constitutional points.

The Government's brief was filed by the following: Homer S. Cummings, Attorney General; Stanley S. Reed, Solicitor General; Frank J. Wideman, James W. Morris, Assistant Attorneys General; Sewall Key, Andrew D. Sharpe, Robert N. Anderson, Alger Hiss, Special Assistants to the Attorney General; Mastin G. White, Solicitor Department of Agriculture; Prew Savoy, Department of Agriculture, of Counsel.

The brief for the Receivers of the Hoosac Mills Corporation, Respondents, was filed by Edward R. Hale and Bennett Sanderson; George Wharton Pepper, Humbert B. Powell, James A. Montgomery, Jr., J. Willison Smith, Jr., Edmund M. Toland, John L. Sullivan, of Counsel.

The brief as Amicus Curiae on behalf of the National Association of Cotton Manufacturers was filed by Malcolm Donald, Edward E. Elder; Herrick, Smith, Donald & Farley.

FURTHER CONTROL OF LAWYERS' FEES IN SOVIET RUSSIA

By KENNETH M. THORPE
Member of the Kansas City, Mo., Bar

THE readers of the JOURNAL have been informed of the incorporation of the lawyers of the Soviet Union into federations, collectives or cooperatives, each such organization having control over a plurality of collegia; and each collegium being composed of a number of attorneys and the income of the collegium being divided according to a determined plan.[1] The jurisdiction of each cooperative or collective is territorially limited to a city, province, county or other administrative unit.

1. American Bar Association Journal, Jan. 1935, p. 60.

The Soviet Union attempts to maintain all values in balance so that the prices received by industry and agriculture for their products, and the income of the members of the professions for their services, shall be in due proportion, one to another, according to communistic theory. Therefore, in the endeavor to limit the income of the lawyers by control of their charges in proportion to the income of their clients, the Soviet Union early found it desirable to enforce tariffs establishing maximum charges which could be exacted for the services of a lawyer. Thus, the

government expects to preserve a balance between the values created by producing units. Although, the Soviet Union would unquestionably prefer to liquidate the lawyer, he still has the status of a producing unit. The Russian writers state, however, that it will be easier to raise a new generation of lawyers, than it will be to rebuild or recast the present Russian lawyers to the communistic pattern or mold. The procurator of the Union of Soviet Socialist Republics (USSR), Vishinsky, recently stated:[2]

"The first demand, which should be made of a defender (a lawyer) is a high feeling of political responsibility, high political qualifications, high training, good schools, state discipline; in a word, all of those qualities, which will diminish the delaying tendencies of the defense; to enter into the arena and fearlessly fight, for what he believes, not through the interest of his client, but through his (personal) interest in the upbuilding of socialism, through his (personal) interest in our state." (Matter in parentheses inserted by writer.)

In the same speech, as reported in a different publication, Vishinsky strongly criticized the courts for the great volume of hurriedly and improperly adjudicated cases.[3] The lawyer's dilatory tactics, therefore, were of little avail in postponing decisions. From the above quotation it will be noted that, according to the communist plan, the first duty of the lawyer is to consider what he believes best for society, not for his client. This so-called social duty of the lawyer and of the law is now being agitated in this country. The practical application of this principle requires the enforcement of statutory law to suit the social condition of the accused, with the result that the precept, "All are equal before the law," is obliterated.

The most recent decree for the control of the lawyers' fees is an order of the Supreme Court of the Russian Sovietic Federated Socialist Republic (RSFSR), dated July 3-4, 1935.[4] By this order, commissions are to be set up throughout the republic, the chairman of each commission is to be a member of the presidium (presiding council) of the superior court of the district or province; the members are to comprise the chairman or assistant chairman of the local lawyers' cooperative, the chairman of the local union of court workers (unionization is practically universal), and the local public prosecutor. Thus, the commission comprises three governmental members and one member as a representative of the lawyers. Each commission is empowered to consult with experienced lawyers, members of the court workers' union, and others, to determine the proper rate to charge for legal services and advice. The commissions are required to submit their findings, within one month from the date of the order, to the Supreme Court of the RSFSR for approval.

Following the usual practice in decrees and orders emitted in Russia, the court fixes the conditions which are to govern the work of the commissions. First, those cases which must be handled gratis, regardless of the income of the client, and then those individuals entitled to free legal aid, are particularly specified, as follows:

1. All questions involving maintenance, i. e., the obligation of the family or blood relatives to support the children, the aged, the disabled and the invalids.
2. All cases involving personal injuries.
3. All disputes as to employment rights, where the amount involved does not exceed 200 roubles.
4. To members of the working masses, employees and artel members belonging to the lowest paid category (less than about 100 roubles per month).
5. To pensioners (old age, retirement, disablement), receiving the minimum monthly stipend.
6. To collective and individual peasants, when the soviet of their village certifies their inability to pay and the reason therefor.

The balance of the population are to pay for legal advice and services of every kind, in both civil and criminal cases. The commissions are directed to divide the people into seven categories or groups, as follows:

A. The working masses (all working for or attached to state enterprises or agencies, regardless of the character of their work, factory workers in most industries, public utility employees, the workers in nationalized industries—mining, lumbering and petroleum, the employees of banks—also nationalized—and the agricultural laborers employed on the state farms, to name the most important groups).

B. Artel workers, employees and members (cooperative productive enterprises).

C. Pensioners.

D. Collectivized peasants (cooperative farming).

E. Individual peasants (those farming as individualists).

F. Non-cooperative home workers and free traders or professions (kulaks?, foreigners?).

G. Non-workers.

The members of the working masses, Group A, are to be divided into not less than five classes, according to their monthly income and social and material situation. Then, within each of these classes, a maximum charge is to be fixed for every type of legal service and advice. Thus, every successive class within Group A will pay an increasing charge for the same type of service.

The charges to be rendered Group B, artel workers, are to be based on the ordinary monthly income (salary) of the individual, plus the average annual bonus received from his artel. This bonus results where operations have produced an income over expenses, taxes, insurance, and overhead.

The charges to be rendered Group C, the pensioners, shall be fixed by the amount of the monthly pension. If the pensioner works to supplement his income, his earnings are not to be taken into account in arriving at his charges.

The charges to be rendered Group D, the collective peasants, are to be determined by assigning them to one of the classes established in Group A, not however, exceeding the third class. Thus the collective peasant, regardless of his actual income, may sometimes pay less than he should in proportion to the industrial worker, and at other times he may be required to pay more than his just proportion.

The charges to be rendered Group E, the individual peasants, are to be determined by reference to the agricultural tax (tax-in-kind), each peasant is required to pay to the state. Thus, the individual peasant cannot conceal his income, since his tax is of record. His tax is much higher than that of the collective peasant, consequently his legal charges will unquestionably be materially higher.

The charges to be rendered Group F, the home workers and the free traders or professionals (?), shall be determined by arbitrarily classifying them with the highest class of Group A, which, with present rates of

2. Za socialisticheckuyu Zakonnost, (For socialist legislation), July, 1935, No. 7, p. 21 (official organ of the procurator of the USSR).

3. *Journal of the Patent Office Society*, October, 1935, p. 833.

4. *Sovetskaya Justicia*, (Soviet Justice), September, 1935, No. 27, printed in October (official organ of the Peoples' Commissariat for Justice of the RSFSR).

pay, will probably be about 900 roubles per month. Thus, Group F will be charged excessively in comparison to Group A.

The charges to be rendered Group G, the non-workers, shall be by agreement between the lawyers' collective and the individual. Thus, according to communistic principles, this group is at the mercy of the avarice of the lawyer, while all other groups are offered a measure of protection against over-charges. Since there is no provision in the directions of the court for charges to be rendered foreigners, it may be that they will be classed in this group, instead of Group F, as the native non-workers have been liquidated.

The directions further provide that charges may be increased with the consent of the presidium of the collective, when the work is particularly onerous and when the lawyer is required to visit the accused at his place of confinement, business, hospital or home. The charge rates are to be sufficient to carry a case through two courts; 60% of the total charge to be taxed to cover the trial, and 40% for the appeal. State and public organizations are to pay for legal advice and services in accordance with a special charge sheet to be established by the presidium of the lawyers' collective and approved by the superior courts and unions of the district affected.

It is apparent that the lawyer's position in a regime of controlled production, when carried to its ultimate and logical conclusion, is bound to be unenviable. There is comparatively no legal practice, other than a large volume of criminal cases, since civil disputes between producing units are subject to governmental direction and are almost all settled by arbitration between governmental agencies.

A DEFINITION OF LAW

By Hon. William J. Palmer
Judge of the Superior Court, Los Angeles

JOHN MAXCY ZANE begins his excellent book titled "The Story of the Law" with appropriate comment on the difficulty experienced by all scholars in trying to define the word "law." He says that while "almost everyone of ordinary information understands very well what is meant by the word," even the "most learned jurists, when called upon to give an accurate definition of the term, find themselves at a loss." Then the lawyer-author delivers this challenging statement: "No jurist has yet achieved a definition of law that does not require the use of the idea of law, either implied or expressed, as a part of the definition." Could one define any abstract term without using the idea denoted by the term? What is a definition if not a statement in different words of the idea signified by the word defined? Is it not the chief purpose of a definition to express in words that one understands the self-same idea denoted by a word he doesn't understand?

Perhaps Mr. Zane's statement does not accurately convey his thought. Occasionally anyone who writes discovers that his words have not carried the intended message to the other mind. A weakness that could be pointed out in nearly all definitions of the word "law" is that they use and depend upon some synonym of the defined word that offers exactly the same problem of definition as the word itself. This probably is the fact that Mr. Zane had in mind. The common reference to the law as a body of rules or principles is an example. Mr. Zane, without pretense of stating a definition, says: "All will agree that the word in its meaning implies a set both of general principles and of particular rules." As he, himself, is well aware, that is another way of saying that law is a set of laws.

If the effort to define the word "law" were merely an academic pastime, with no practical significance, one hardly would be justified in engaging in it. But definitions often are important. It is quite possible for one to follow a long chain of thought only to arrive at a false conclusion because he began with an inaccurate definition. Occasionally two or more persons will engage in protracted argument over a question with respect to which they are not really at issue, but only seem to be because they covertly define their terms differently. One of the most natural and common experiences of the human mind is to be confused in its perception of realities by the words used to designate them, and it is not uncommon for the mind to have a vague idea that it has done away with or changed a reality when all it actually has done has been to give it a different name.

So it would seem to be worth while if we could find out exactly what the law is.

Law, as I define it, is the articulated effort of two or more living entities to get along together.

While I apprehend that the expression "living entities" is slightly ungraceful, I have used that broad term rather than "persons" or "human beings" because, as is generally known, even among insects and other animals there are fixed systems of jurisprudence, constituting their respective methods of getting along together. This definition contains no synonym of the word "law," but of course, in requiring that the effort to get along together be articulated, I do incorporate in my definition the "idea of law." If I did not do so, my sentence would not be a definition.

There are a few tests that we can apply to the definition to determine its accuracy and sufficiency.

First, if the definition is a true one, it follows that we have no law until there is contact between two or more beings who want to get along together. That, as I see it, is exactly the fact, and indicates the origin of law and the sole reason for its existence. When two children at play set up their rules of the game, they are lawmakers, designing a method which, in their judgment, will enable them to play better together and to be more certain of fun in the playing. The difference between anarchy and a régime of law is that in the former case those involved do not want to get along together, and in the latter they do.

Secondly, it follows also that the more difficult it becomes for persons to get along together, the more laws they make in the effort. That, too, is the fact, and explains the enormous accumulation of laws with which we have become burdened. The thought here involved is too significant to be passed over lightly and I wish to discuss it further. What are the causes of difficulty in our getting along together? The one that must

be mentioned first is deficiency in character. It can be truthfully said that to a certain degree laws are a substitute for character. For every failure in moral education, we feel compelled to enact more laws.

While this substitution of law for education often is necessary to save us from the dire results that naturally would follow the failure in moral education, it is at best only a makeshift, providing no permanent solution.

There are those who would urge as a more basic cause of difficulty the fact that the complex scheme of things economic, upon which we depend for profitable employment and association, has failed us. Some claim that this is due to the inherent weakness of the scheme, without individual blame, while others hold that even this failure is attributable to lack of character in those who do or should operate the economic machinery. Leaving this question to economists and others to debate as they will, I wish merely to point to the fact that the increase in the number of laws, which follows every new factor or growth of difficulty in our effort to get along together, demonstrates that law itself is simply an effort in that direction and should be so defined.

There is yet another test that I wish to apply to the definition. If it is true, it follows that law is more of a result, symptom or expression of intellectual and moral progress than a cause. As I have pointed out previously, it is only when people want to get along together that they set up a system of jurisprudence, and it is only as and after people, their ideas and their social conditions change that the laws are changed. The law trails, in other words.

There is, however, one significant exception to the general rule that law is a symptom, or result, and not a cause. Paradoxical as it might seem at first thought, this exception comes with a bad law. Bad laws have been the direct causes of social upheavals. I am not quite sure but that it would be correct to say that bad laws have caused all social upheavals.

This exception verifies the accuracy of the definition. If law is the articulated effort of a number of beings to get along together, it follows that when that effort is a mistaken one, when the wrong method is used to accomplish that definite purpose, unless a change is made with reasonable promptitude, nothing but a revolt can result. The seriousness and extent of that revolt will be in direct ratio to the degree of error in the bad law, the extent to which it was enforced and the length of time it existed. The simple truth in this statement will explain nearly all human history.

Perhaps someone will ask: "How does this definition apply in a state under the absolute rule of a dictator or monarch, where one man is the sole lawmaker? Can we say that his laws are the effort of two or more beings to get along together?" My answer is "yes" as positively as if we were dealing only with a democracy. Although the dictator is the dominant factor in deciding by what methods he and his subjects will undertake to get along together, his people nevertheless agree to those methods by acquiescence and submission. That they believe the only alternative of submission to be death, imprisonment or exile is beside the point so far as our definition is concerned. There might be other reasons, too, for their obedience. As long as they yield to the will of the ruler, his will is law, and it ceases to be such the minute they refuse to yield. Even the monarch, unless he is utterly stupid, is influenced in some degree by the temper and will of his people. If he has no other purpose than self aggrandizement, he yet knows that there is a limit of endurance beyond which he cannot safely go. If he is normally human he wants the good will and plaudits of his subjects, and if he is beneficent, his purpose is the same as that which should guide the lawmakers in a democracy. In any event the effort is to bring minds together on a program of getting along together.

Under our definition, international law becomes the articulated effort of two or more nations to get along together. And that, I submit, is exactly the case.

The virtue of the definition, as I see it, is that it tells so much about the law so quickly. It tells not only the origin and purpose of law, but explains why some laws succeed and others fail, and it also sets up a standard by which to judge the worth of every law. Someone may ask whether I contend that the definition applies to the "laws of nature." That depends on one's philosophy or religion. It may be as true of the "laws of nature" as of the laws of man. Ascribing the existence of natural laws to some intelligent purpose, I am inclined to believe that my definition holds good. However, let us be practical: Contemplating this definition, one realizes that the end and purpose of progress and civilization, of all efforts toward understanding and the promotion of knowledge, is that we who travel on the tiny ship called earth, making a majestic journey through the mysterious and unfathomed reaches of space, can get along together with more happiness and greater security.

The New Frazier-Lemke Act

(*Continued from page* 20)

The stay must be for the fixed period of three years, and at the end of that time the mortgagee gets no more than he is presently entitled to. For perhaps a year, as contrasted with a half year under the old act, he gets no rental and has no assurance that it will be paid at the end of that period. The nominal control of the court over the property during the three year period still is not comparable to having it in the hands of a bonded receiver. And, as has been seen, the new act apparently invades rights which the old did not, in that it deprives lienors of the mortgagor of their right to redeem from foreclosure sale in the event the mortgagor does not.

The committee hearings in Congress on the new act brought to light facts which indicate that some relief to farmers such as the Frazier-Lemke Act contemplates is desirable.[32] Conciliation commissioners reported that the mere threat of the debtor's invoking its provisions enabled them to effect adjustments between debtor and creditors out of court in nine out of ten cases. Moratory legislation enacted in twenty-six states, it was reported, soon will expire, thus making even more necessary Federal protection against wholesale foreclosures. On the other hand, if the states fail to re-enact their moratory laws, that will be strong evidence that the necessity for such legislation has passed. Current newspapers carry accounts of farm land "booms" in Iowa. Many people now speak of it as "the late depression," and there are indications that it is not wholly propaganda. Certainly the need for the Frazier-Lemke Act is no greater than was the case under the first act, and the Court said in the *Radford* case that it had no concern with the desirability of the legislation if it violated the Fifth Amendment. And it appears that the new Frazier-Lemke Act still does.

32. See Senate Report No. 985 on S. 3002, May 13, 1935.

Current Events

(Continued from page 7)

this was the contention, counsel replied that he thought it was settled that Congress could withdraw the Government's consent to be sued even after the filing of a suit to recover money paid in to the Treasury.

The gist of the Government's argument in this case was that the Agricultural Adjustment Act was a "legislative enactment within the Constitution, based on the use of revenue and co-operation to bring about a nation-wide economic balance."

In the T. V. A. case fourteen minority stockholders of the Alabama Power Company have sought to enjoin performance of the contracts whereby the Government seeks to purchase transmission lines and lease them to municipalities in Tennessee and Alabama. The Government claims the right to perform these functions under its war powers, since it is selling surplus power generated by equipment which might be used to make explosives in times of war, and in connection with its control over navigable streams. The Alabama Power Company states that its "existence and business in its entirety" are threatened by these activities of the Government in the Tennessee Valley.

Similar in principle was the attack by Vermont on the Federal power program as an invasion of States' rights. Attorney General of Vermont, Lawrence C. Jones, contends that his State "does not care to delegate the regulation of utility rates and service [from the Passamaquoddy project] to the Federal Government." He says, further, that Federal projects such as T. V. A. and "Quoddy" should be limited to actual "improvements of navigation." His argument proceeded to the effect that the T. V. A. claimed exclusive Federal rights "to utilize surplus waters for the direct commercial manufacture and sale of electricity by the Government . . . without the consent of the State, without revenue to the State and without regulation by the State."

Another case, which was argued December 18th, bore an unusual resemblance to the Moor case, wherein the Bankhead cotton control Act was being tested. It did not even involve any of the so-called New Deal legislation. The similarity consisted of the fact that counsel fainted during the argument, something which does not often occur twice within ten days. Solicitor General Reed, who had had the same experience during the previous week, aided in catching Frederick B. Campbell, of New York, before he could fall. After a few hours rest in the Marshal's office he was greatly improved. His associate continued the argument after a short recess.

In this case, Mr. Campbell was disputing the Government's claim to about $3,000,000 in assets of dissolved Russian insurance companies in the United States. The claim was based on the Roosevelt-Litvinoff agreement of 1933, which accompanied our recognition of the Union of Soviet Socialist Republics, and which assigned Soviet claims in this country to the Federal Government. Questions asked the Government's counsel by several of the Justices were interpreted by some of the listeners as indicating doubt whether the Court could consider this dispute on its merits because the New York State courts have accepted jurisdiction over the funds in question.

Fingerprint Files—Civil and Criminal

A growing knowledge among citizens of the nation that the Federal Bureau of Investigation in the Department of Justice has two distinct fingerprint files is enabling that bureau to render a constantly wider service to the public. The Civil Identification file is becoming more valuable as the number of entries increases. During its two year existence there have been volunteered, for reasons of personal precaution, 60,059 fingerprint cards. The total number of fingerprint records in the Identification Division, civil and criminal, is now more than 5,385,943.

Fingerprints for the bureau's files have come from volunteer groups of citizens through police departments, from civic clubs, from commercial companies, and from bankers' protective organizations. During one month recently the facilities of the Bureau of Investigation were used in efforts to identify 91 unknown deceased persons. In 23 cases these attempts were successful. Usually additional information was furnished such as birthplace, residence, and the names of relatives or friends.

Several of the requests for identification came as a result of automobile accidents to highway pedestrians. One involved a man who had been shot and claimed he had attempted to commit suicide. The police doubted his story and learned, through the fingerprint records, that, under a different name, prior to his escape, he had been serving a long sentence in the reformatory of another state, for highway robbery. In a number of cases, war risk life insurance was claimed where World War veterans had not been heard of for more than seven years; but, upon search, it was found that the man had been arrested and fingerprinted more than seven years after his disappearance.

Injunction Suits—Findings and Conclusions Required

The Equity Rules of practice before Federal Courts (226 U. S. Appendix, 281 U. S. 773) were amended by the Supreme Court, November 26, 1935, so as to require findings of facts and conclusions of law by courts of first instance in granting or refusing interlocutory injunctions. Rule 70½ was amended to read as follows:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon, and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action.

"Such findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

"The Making of the Constitution"

The Bar Association of the District of Columbia has joined the list of local associations to give the very interesting historical pageant entitled "The Making of the Constitution." It has been presented in Kansas City, Philadelphia, Chicago and Los Angeles and is to be staged in the near future in Salt Lake City. The creditable performance in Washington was on the evening of December 18th, in Constitution Hall.

The Prologue, written by Hon. Wendell Phillips Stafford, a retired Justice of the District of Columbia Supreme Court, well indicates the tone of the piece. It follows:

When in a royal house a child is born
Whose destiny may be to mount the throne
Great officers of state from night to morn
Watch in the chamber that the truth be known.
No subterfuge may foist upon the realm
Some child of other than the regnant race;
No doubts must ever rise to overwhelm
The monarch's mind or shake him in his place.
Thus round our Constitution's natal couch
Were eagle-eyed and mighty men, who stood
And watched its painful birth, and could avouch
To later time its pure and lineal blood.
The curtain of the years that intervene
We now draw back, and show that noble scene.

General Council and Committee Meetings

The General Council and the Executive Committee of the American Bar Association will hold a joint session at the Palmer House, Chicago, commencing at 10 o'clock on the morning of January 13th. The members of the Coordination Committees of the Association, together with the Bar Reorganization Committee of the Conference of Bar Association Delegates, will also meet in Chicago at that time.

Death of Hon. William D. Guthrie

WILLIAM D. GUTHRIE of New York City died at his Long Island estate on December 8 of a heart attack. In the fifty-five years since his admission to the New York bar he has become internationally known as a lawyer and a writer on political and legal topics. He had been a member of the American Bar Association since 1898 and active in its affairs for a number of years. He served on the Association's Committee on International Law for several years and at the time of his death was chairman of the Special Committee to Oppose Ratification of the Federal Child Labor Amendment and Promote the Adoption of the Uniform Child Labor Act.

Born in San Francisco, and educated in France, England and this country, Mr. Guthrie became a stenographer in a law firm in 1875 and studying law there and at Columbia Law School he was admitted to the bar in 1880. One of the early interesting cases of his career was Bankers and Merchants Telegraph Company v. Western Union Telegraph Company in 1885, in which case he was associated with Robert G. Ingersoll and Roscoe Conklin.

He had the opportunity of participating in numerous other well known and important cases, according to the New York Times, including the Federal income tax case in 1895, when he was associated with United States Senator Edmunds, Clarence A. Seward and James C. Carter; the California irrigation cases, the Illinois inheritance tax cases in 1898 and 1902; the Kansas City Stock Yard case, the so-called lottery case in 1902, the Plant will case, the oleomargarine cases in 1903, the Northern Securities Company case, the Third Avenue Railroad reorganization case in 1911, the national prohibition cases in 1920, the New York emergency rent law cases; the Oregon school cases, the five-cent fare referendum case in 1925 and the New York budget case in 1929.

Mr. Guthrie acted as counsel for the Catholic Church before the New York Constitutional Convention in 1915. His knowledge of canonical law also caused him to be engaged as counsel in the Oregon school law cases before the United State Supreme Court, and he was consulted by the hierarchy for his legal opinion with reference to the constitutional aspects of the Mexican church problem. In 1929 Mr. Guthrie was one of counsel in the case of the Archbishop of Manila before the Supreme Court.

His arguments were distinguished for clarity and a broad grasp of legal principles. Mr. Guthrie served as Storrs lecturer at Yale University in 1907-9 and as Ruggles Professor of Constitutional Law at Columbia University and member of the law faculty from 1911 to 1921.

He wrote extensively on legal and political topics and among his works were "Lectures on the Fourteenth Amendment to the Constitution," "Magna Charta and Other Essays," "League of Nations and Miscellaneous Addresses," "Constitutional Aspects of National Prohibition" and "The Beck-Linthicum Prohibition Amendment."

Bar Association News

The Colorado Bar Meeting

THE thirty eighth annual meeting of The Colorado Bar Association convened in the Rose Room of the Antlers Hotel at Colorado Springs, on Friday, September 20, 1935, at 10:30 A. M., with President William S. Jackson, of Colorado Springs, in the chair. The El Paso County Bar Association proffered its warm welcome through its president, John P. Foard, of Colorado Springs.

The assembly immediately commenced hearing and consideration of reports from administrative officers, trustees of the old age fund, and standing and special committees. The latter, through their respective chairmen, reported as follows: Membership, David Rosner; Grievances, Erl H. Ellis; Judicial Procedure, Paul W. Lee; Legal Education, Peter H. Holme; Legal Biography, Albert L. Vogl; Local Bar Associations, Wilbur F. Denious; Legal Development, Mary F. Lathrop; American Citizenship, Albert G. Craig; Costs of Abstracts of Title, Albert L. Vogl; Integration of the Bar, Robert L. Stearns; and Legal Aid, Charles J. Munz.

The Committee on Integration of the Bar had not completed its exhaustive and detailed research on the subject, and asked for an extension of its life for another year, which the Association so ordered. The membership of this committee has been composed of representatives from each judicial district in the state, appointed by President Jackson irrespective of Association membership, to the end that the entire bar of the state should have a part in the discussion and decision of the question.

The Trustees of the Old Age Fund, reporting through Chairman Edward Ring and Treasurer Wilbur F. Denious, showed a slow and steady increase in the capital of this trust, which had more than demonstrated the wisdom of its founding.

The reports of Albert G. Craig, Mary F. Lathrop and Albert L. Vogl on the sessions of the American Bar Association at Los Angeles held the interest of their audience.

The chief features of Friday's afternoon meeting were President Jackson's address on "Our Bill of Rights," and an address on "The Restatement and the Practicing Lawyer," by Hon. George Thomas McDermott, United States Tenth Circuit Court of Appeals, of Topeka, Kansas. Hartley Murray, of the University of Colorado Law School and editor of the Rocky Mountain Law Review, followed Judge McDermott, setting forth what is being

HENRY C. VIDAL
President, Colorado Bar Association
1935-36

achieved in preparing Colorado annotations to the various volumes of The Restatement of the Law.

On Friday night at 8:30 o'clock the annual address was delivered by Hon. John Dickinson, of Washington, D. C., Assistant Attorney General of the United States, on the subject of "Government by Due Process." In this the doctrines of the New Deal received an explication keen, novel and dispassionate.

On Saturday morning, with First Vice-President Horn presiding, the assemblage heard addresses on "Is Centralization the Only Alternative?" by Henry Wolcott Toll, and "Interstate Crime Compacts," by Paul P. Prosser, Attorney General of Colorado. These presented other aspects of the New Deal.

In the afternoon Prof. Joseph Percival Pollard, of Colorado Springs, spoke on "Trends in Constitutional Law," with especial reference to Chief Justice Roger B. Taney's influence in leading these.

Business sessions were closed with the election of officers of the Association for the following year: President, Henry C. Vidal, of Denver; First Vice-President, John P. Foard, of Colorado Springs; Second Vice-President, William R. Kelly, of Greeley; and Secretary and Treasurer, Harrie M. Humphreys, of Denver.

Mr. Vidal is a leading light in irrigation law, and a member of the firm of Hodges, Wilson & Vidal, of Denver. His reputation as an after-dinner speaker will keep him busy before local bar associations during his term of office.

The annual dinner on Saturday night brought forth an attendance larger than usual. President Jackson acting as

WILLIAM S. JACKSON
Retiring President, Colorado Bar Association

toast-master, introduced Seeley K. Tompkins, of Colorado Springs, Justice Benjamin C. Hilliard, of the Supreme Court, Denver, and the incoming President, Henry C. Vidal, of Denver, who made the guests happy to have been present.

On the further entertainment side of the meetings, The El Paso County Bar Association, on Friday noon, gave a luncheon and vaudeville for the members of the State Bar Association, while at the same time the ladies in attendance on the meetings of the Association were guests of the wives of members of the local bar association at a buffet luncheon at the residence of President Jackson.

On Friday evening, prior to the annual address, Miss Mary F. Lathrop gave her annual dinner to the ladies of the State Association, and Past-President W. W. Grant entertained at the annual dinner to the past Presidents, and other guests of the Association.

HARRIE M. HUMPHREYS,
Secretary.

Louisiana Incorporated State Bar Meeting

THE State Bar of Louisiana, as incorporated by Act Nos. 10 and 21 of the Extraordinary Sessions of the Louisiana Legislature in 1934, held the first annual meeting in its history at Baton Rouge, Louisiana, on November 1st and 2nd, 1935, with a recorded attendance of practically three hundred lawyers.

A varied program, covering the pleading, the judicial, and the teaching field of the profession, was offered, as follows:

Invocation, Rev. J. A. Christian of First Presbyterian Church, Baton Rouge.

Address of Welcome, Mr. Hermann Moyse, of the Baton Rouge Bar.

Response for The State Bar, Mr. Leon O'Quin, of the Shreveport Bar.

Annual Address, Hon. Gaston L. Porterie, President.

Legislative Procedure in the Adoption of the Code Napoleon, Mr. John H. Tucker, Jr., of the Shreveport Bar.

Reminiscences of a Veteran Jurist, The Honorable John R. Land, Senior Associate Justice of the Supreme Court of Louisiana.

The Supreme Court and the New Deal, Mr. Henry P. Dart, Jr., of the New Orleans Bar.

Some Factual Viewpoints Relating to Constitutional Limitations, Mr. E. Howard M'Caleb, Sr., of the New Orleans Bar.

The State District Judge and the Bar, The Honorable David I. Garrett, of the Monroe Bar Judge, Fourth Judicial District of Louisiana.

The Problems of Legal Education in Louisiana, Dr. Frederick K. Beutel, Dean of the Law School, Louisiana State University.

The report made by the representatives of the various local bar associations of the State contained the following two important items:

Recommendations

1. That the Board of Governors conduct a referendum to the lawyers, at a time within its discretion it deems best, for an impartial, deliberate and informed vote on the question as to whether the people, as under the present statute is provided, or the lawyers shall elect the members of the Board of Governors of The State Bar of Louisiana.

2. That the Board of Governors conduct a referendum to the lawyers, at a time within its discretion it deems best, for an impartial, deliberate and informed vote on the question as to whether the educational requirements, as now fixed by statute for admission to the Bar of a high school training or its equivalent, be raised to the requirement of a two-year college course, or its equivalent.

Upon motion properly made and seconded, the report of the local bar associations of the State was accepted as offered, and adopted in its entirety by The State Bar of Louisiana.

[NOTE: The objections urged by many lawyers to several provisions of the Louisiana State Bar Act were indicated in the AMERICAN BAR ASSOCIATION JOURNAL for Dec., 1934 (page 744). The decision to ascertain the views of the lawyers of the State upon the two questions recommended by local Bar Associations of Louisiana, may be a step toward solution of these matters.]

GASTON L. PORTERIE
President, Louisiana State Bar